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Gun Violence and Human Rights

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Gun Violence and Human Rights

Leila Nadya Sadat & Madaline M. George*

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. . . Second Amendment rights are important, but there are other rights that we care about as well. And we have to be able to balance them. Because our right to worship freely and safely -- that right was denied to Christians in Charleston, South Carolina. And that was denied Jews in Kansas City. And that was denied Muslims in Chapel Hill, and Sikhs in Oak Creek. They had rights, too. Our right to peaceful assembly -- that right was robbed from moviegoers in Aurora and Lafayette. Our unalienable right to life, and liberty, and the pursuit of happiness -- those rights were stripped from college students in Blacksburg and Santa Barbara, and from high schoolers at Columbine, and from first-graders in Newtown. First-graders. And from every family who never imagined that their loved one would be taken from our lives by a bullet from a gun.

-President Barack Obama (2016)¹

INTRODUCTION

The media is flooded with stories of gun violence. Mass shootings occur daily, suicide by firearms is a public health crisis, and the Center for Disease Control (CDC) reported that 173,500 people were shot in 2017, over 39,700 of whom died. That is an average of nearly 109 killed and another 366 who suffered nonfatal injuries from guns *every day*. The United States has more firearm deaths than other high-income countries and Americans own nearly 46% of all civilian-owned guns in the world, even though comprising only 4.3% of the world's population. In fact, it is estimated that there are more firearms than people in the United States, and firearms and ammunition are becoming more dangerous and powerful than ever before.² To put it in context, in 2017 in the United States, 1,750

1. Barack Obama, *President Obama Delivers Remarks on Reducing Gun Violence*, YOUTUBE (Jan. 5, 2016), www.youtube.com/watch?v=myfByN5p928.

2. Much of the research upon which this Article is based can be found in our earlier report. Leila Nadya Sadat & Madaline M. George, *The U.S. Gun Violence Crisis: Human Rights Perspectives and Remedies*, WASH. U. IN ST. LOUIS LEGAL STUDIES RESEARCH PAPER NO. 19-01-11 (Jan. 18, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317143.

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people died from forces of nature,³ fewer than 100 died from terrorism,⁴ and 39,700 were killed by guns. More Americans have died from gunshots in the last fifty years than in all of the wars in American history.⁵ Yet guns, including particularly deadly weapons like the AR-15, the weapon used in the Parkland, Sandy Hook, Aurora, Pulse Nightclub, Las Vegas, Sutherland Springs, San Bernardino, and Tree of Life Synagogue shootings, remain easy to acquire, stockpile, and carry.

The U.S. government is fully capable of managing crises of this magnitude. Compare, for example, its response to high rates of death and injury from motor vehicles in the 1950s. The federal government adopted mandatory safety measures, imposed penalties for rules violations, and funded research studies. In contrast, few regulations or studies have focused on firearms. Perhaps unsurprisingly, mortality rates from firearm violence have increased since the 1950s, while those from motor vehicle accidents have declined 59%.⁶

Indeed, when it comes to guns and gun violence, the government – and the media – claim to be powerless. One reason is that news coverage and the national dialogue around gun violence often focuses on *gun* rights and

3. CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), WEB-BASED INQUIRY STATISTICS QUERY AND REPORTING SYSTEM (WISQARS) [hereinafter CDC WISQARS], <https://webappa.cdc.gov/sasweb/ncipc/nfirates.html>, *Natural/environmental deaths, 2017*.

4. See UNIVERSITY OF MARYLAND, GLOBAL TERRORISM DATABASE, GLOBAL TERRORISM IN 2017 (July 2018), www.start.umd.edu/pubs/START_GTD_Overview2017_July2018.pdf (determining that 91 people died from terrorism in the United States in 2017, including the 58 people killed in the Las Vegas mass shooting). This database defines terrorism using a number of criteria that exclude many hate crimes, acts of white supremacy, or other acts that should arguably be considered domestic terrorism. Nonetheless, it is a good indicator of the actual threat in the United States of what is traditionally considered terrorism. Cf. UNIVERSITY OF MARYLAND, GLOBAL TERRORISM DATABASE, CODEBOOK: INCLUSION AND VARIABLES 10 (July 2018), www.start.umd.edu/gtd/downloads/Codebook.pdf.

5. Chelsea Bailey, *More Americans Killed by Guns Since 1968 Than in All U.S. Wars — Combined*, NBC NEWS (Oct. 4, 2017), www.nbcnews.com/storyline/las-vegas-shooting/more-americans-killed-guns-1968-all-u-s-wars-combined-n807156.

6. Garen J. Wintemute, *The Epidemiology of Firearm Violence in the Twenty-First Century United States*, 36 ANN. REV. PUB. HEALTH 5, 6 (2015). See CTRS. FOR DISEASE CONTROL & PREVENTION, *Achievements in Public Health, 1900-1999 Motor-Vehicle Safety: A 20th Century Public Health Achievement*, 48 MORBIDITY & MORTALITY WKLY. REP. 369 (May 14, 1999), www.cdc.gov/mmwr/preview/mmwrhtml/mm4818a1.htm.

the Second Amendment.⁷ But what about *human* rights? The right to learn, worship, attend a concert or movie, or simply go to the bank without the fear and uncertainty of becoming the next victim of a mass shooting. The right of women to live without the concern of dying at the hands of their abuser with a legally purchased firearm. The right of people of color to live freely absent the threat of a neighborhood vigilante shooting at them whilst protected by ‘Stand Your Ground’ laws or to die at the end of a police barrel. The right not to suffer the psychological stress and mental harm that gun violence causes for both the direct victims and the population more broadly. These rights are protected by international human rights treaties ratified by the United States as well as customary international law. They include the right to life and bodily integrity, the right to security of person, the right to an education, the right to health, the right to freedom of religion, association, opinion, expression, and assembly, the right to share in cultural life, and the right to be free from and cruel, inhuman or degrading punishment, and from discrimination based on race and gender. As the U.N. High Commissioner for Human Rights noted in 2016, “[g]iven the potential harm and devastating impact of the misuse of firearms on the enjoyment of human rights, public policies with respect to civilian access to firearms should be reviewed and formulated through a human rights lens.”⁸

This Article challenges the prevailing narrative, using a human rights lens to research, analyze, and propose concrete actions to address the U.S. gun violence crisis. In it, we make five central claims. First, we argue that the U.S. gun violence crisis implicates the rights enshrined in human rights treaties and customary international law that protect individuals living in the United States.⁹ Second, we establish the responsibility of the U.S.

7. For example, the day after the largest mass shooting in modern U.S. history, the Las Vegas massacre, Bill O’Reilly called the attack the price of freedom and defended the Second Amendment. Bill O’Reilly, *Mass Murder in Las Vegas*, BILLOREILLY.COM (Oct. 2, 2017), www.billoreilly.com/b/Mass-Murder-in-Las-Vegas/851098107399788721.html.

8. U.N. High Comm’r for Human Rights, *Human Rights and the Regulation of Civilian Acquisition, Possession and Use of Firearms*, ¶ 52, U.N. Doc. A/HRC/32/21 (Apr. 15, 2016) [hereinafter Rep. of OHCHR 2016].

9. International human rights protect all individuals present in the United States and are not limited to U.S. citizens. Thus, although this Article occasionally makes reference to “Americans,” it should be understood to cover the entire U.S. population, both citizens and non-citizens. *See, e.g.*, David Weissbrodt, Final report on the rights of non-citizens, ¶ 1, U.N. Doc. E/CN.4/Sub.2/2003/23 (2003)

government to address these human rights violations, even though most of the harm is inflicted by private (non-State) actors. Third, given that this violence is largely preventable, as shown by the experience of other countries and the reduction in gun deaths in states with stricter gun control laws, we argue that the United States is violating its international legal obligations by failing to exercise due diligence with respect to preventing and reducing gun-related violence through the adoption of reasonable and effective domestic measures. Fourth, we briefly address the question of the Second Amendment, concluding that although it may currently pose a *political* challenge to the enactment of reasonable gun control measures, it does not pose a *constitutional* or *legal* barrier to their adoption. Finally, we touch upon the question of remedies,¹⁰ outlining the availability of both international mechanisms and national measures to debate and ultimately address these concerns.

Our methodology is simple. We analyze the sociological reality of the U.S. gun violence crisis, including its scale and scope, discriminatory impacts, and psychological effects, relying heavily on public health and social science literature (Part I). We then catalog the patchwork nature of U.S. gun laws, and the current gaps in U.S. firearm laws at both the state and federal level (Part II).¹¹ Part III addresses the experience of other countries and the differences between U.S. states and suggests that, based on this evidence, gun violence is preventable through the adoption of reasonable gun control measures. Part IV very briefly sets forth the

(“In general, international human rights law requires the equal treatment of citizens and non-citizens.”); Human Rights Comm., General Comment 15: The Position of Aliens Under the Covenant, Human Rights Committee, ¶ 7, U.N. Doc. HRIIGEN/I/Rev.1, at 18 (1994) (“in general, the rights set forth in the [International Covenant on Civil and Political Rights] apply to everyone ... irrespective of his or her nationality or statelessness.”).

10. For a fuller treatment of the remedies question, see Sadat & George, *supra* note 2. See also Written Statement of the Harris Institute for the Hearing on “Regulation of Gun Sales and Social Violence in the United States,” Inter-American Commission on Human Rights, 167th Extraordinary Period of Sessions (Feb. 27, 2018), <https://perma.cc/NQ3V-9536>; Whitney R. Harris World Law Institute, *The U.S. Gun Violence Crisis as a Violation of U.S. Obligations Under The ICCPR*, Submission to the U.N. Human Rights Committee ahead of the 125th Session (Jan. 14, 2019), <https://perma.cc/GT5P-G6HJ>.

11. See Colleen L. Barry et al., *After Newtown – Public Opinion on Gun Policy and Mental Illness*, 368 NEW ENG. J. MED. 1077, 1077 (2013); KIM PARKER ET AL., PEW RESEARCH CTR., AMERICA’S COMPLEX RELATIONSHIP WITH GUNS (2017), www.pewsocialtrends.org/2017/06/22/americas-complex-relationship-with-guns/.

international human rights obligations of the United States, and Part V specifies the human rights violations implicated by U.S. gun violence. Part VI surveys the response of international human rights bodies to the U.S. gun violence crisis and considers the challenge of implementing human rights norms in the United States.

We conclude that a decision *not to* enact sensible gun control measures, given the scope of the problem and the solutions readily available, is tantamount to a decision on the part of politicians to violate the human rights of individuals living in the United States. These rights, found in treaties and customary international law, are the “supreme law of the land” pursuant to Article VI of the U.S. Constitution. So a decision not to enact sensible gun control measures is an abdication of their oath of office¹²

We recognize that these are strong conclusions given the significant legal and political challenges to protecting human rights in the United States. The Senate has historically deprived human rights treaties of direct domestic effect by declaring them to be “non-self-executing” and, therefore, unavailable to litigants in U.S. courts. The current U.S. administration is also fiercely hostile to human rights and the entire international system of human rights protection to an extraordinary degree, and the National Rifle Association (NRA) remains a strong and powerful lobby, making gun control measures difficult to adopt, even in the wake of mass shootings. Yet, we nonetheless believe in the value of making the human rights argument, for, as Eleanor Roosevelt noted so many years ago, human rights begin at home.¹³ In spite of the daunting political challenges civil society faces in convincing U.S. politicians to offer more than “thoughts and prayers” to the victims of gun violence,¹⁴ they should know that they are on firm *legal* ground in their insistence that the U.S. government respect their human rights. These rights can be raised in international fora and can become part of the national – and international -

12. See, e.g., U.S. SENATE, *Oath of Office*, www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm (last visited April 15, 2019).

13. Eleanor Roosevelt, In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights, Address Before the United Nations Commission on Human Rights (Mar. 27, 1958).

14. See Dan Barry, *Gunfire Erupts at a School. Leaders Offer Prayers. Children Are Buried. Repeat*, N.Y. TIMES (Feb. 15, 2018), www.nytimes.com/2018/02/15/us/florida-school-shooting-thoughts-prayers.html.

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- conversation about guns and gun violence. They can find voice in advocacy campaigns, like the current effort of Amnesty International¹⁵ – and provide a new lens through which to view the American gun violence crisis and avoid circular and unproductive conversations about the Second Amendment. Finally, as human rights rhetoric becomes normalized, they can also shore up legal and political arguments advanced on other grounds, so that gun control advocates find themselves with a new “tool kit” in the struggle to convince politicians and courts that addressing gun violence through the adoption of reasonable gun control measures is legally, as well as morally, required.

I. GUN VIOLENCE IN THE UNITED STATES IS WORSE THAN YOU THINK

Based on a five-year average from 2013-2017, more than 36,300 people die from guns every year in the United States, or nearly 100 deaths daily.¹⁶ Another 100,100 suffer from non-fatal firearm injuries annually – or about 274 people every day.¹⁷ These numbers have increased significantly over the past two decades and 2017 marked the highest number of firearm deaths in at least forty years – over 39,700 people.¹⁸ Given the negative psychological and mental health consequences for those exposed to gun violence and their communities, the true number of victims is considerably higher, but difficult to quantify.

The United States has the highest number and rate of mass shootings¹⁹

15. AMNESTY INTERNATIONAL, IN THE LINE OF FIRE, HUMAN RIGHTS AND THE U.S. GUN VIOLENCE CRISIS 165-167 (2018), www.amnestyusa.org/wp-content/uploads/2018/09/Gun-Report-Full_16.pdf.

16. CTRS. FOR DISEASE CONTROL & PREVENTION (CDC), WIDE-RANGING ONLINE DATA FOR EPIDEMIOLOGIC RESEARCH (WONDER) [hereinafter CDC WONDER], *Underlying Cause of Death, Results: Firearm Deaths by Intent (1999-2017)*, <https://wonder.cdc.gov/controller/saved/D76/D48F344>.

17. WISQARS, *supra* note 3, *Nonfatal Injury Reports (2000-2017)*.

18. Of these deaths, 60.0% were from suicide, 36.6% from homicide, 1.4% from legal intervention, and 1.2% from unintentional (accidental) deaths. CDC WONDER, *supra* note 16.

19. Federal law does not define “mass shooting.” The Congressional Research Service defines it as a “multiple homicide incident in which four or more victims are murdered with firearms...within one event, and in one or more locations relatively near one another.” WILLIAM J. KROUSE & DANIEL J. RICHARDSON, CONG. RESEARCH SERV., R44126, MASS MURDER WITH FIREARMS: INCIDENTS AND VICTIMS, 1999-2013 2 (2015), fas.org/sgp/crs/misc/R44126.pdf. See also Sadat & George, *supra* note

in the world²⁰ and mass shootings are becoming more frequent²¹ – with an average of about one every day.²² This Article has been constantly updated from its first draft shortly after the Parkland shooting right up to its submission for publication in order to incorporate data from the latest deadly mass shootings – adding Santa Fe High School, the Capital Gazette, Tree of Life Synagogue, Thousand Oaks Bar and Grill, SunTrust Bank in Florida, Henry Pratt Co., and Virginia Beach, to name a few.

School shootings have become a common occurrence – roughly one shooting a week now happens on school grounds in which someone (other than the shooter) is hurt or killed,²³ aggravating the fear that children and parents feel every day. *Mass* school shootings – like the Parkland shooting on February 14, 2018, when a nineteen-year-old killed seventeen people in his former high school – have also become increasingly frequent.²⁴

Communities of color, and especially black Americans, are disproportionately affected by the U.S. gun violence crisis. Although comprising only 14% of the U.S. population, black Americans represent more than 55% of U.S. gun homicide victims.²⁵ As a result, the gun-

2, at Annex 1: Glossary of Terms, p. 110, “Mass Shooting.”

20. James M. Shultz et al., *Multiple Vantage Points on the Mental Health Effects of Mass Shootings*, 16 CURRENT PSYCHIATRY REP. 469, 469 (2014).

21. The rate of public mass shootings has tripled from 2011-14. *Mass Shootings Becoming More Frequent*, HARV. SCH. PUB. HEALTH (2014), www.hsph.harvard.edu/news/hsph-in-the-news/mass-shootings-becoming-more-frequent/.

22. As of June 21, 2019, there had been 2,110 mass shootings – defined as the shooting of “four or more people, excluding the shooter...at the same general time and location” – killing at least 2,383 people and wounding another 8,774 since the December 2012 Sandy Hook Elementary School shooting. German Lopez et al., *After Sandy Hook We Said Never Again. and Then We Let 2,110 Mass Shootings Happen*, VOX, www.vox.com/a/mass-shootings-sandy-hook (last visited June 21, 2019).

23. See *Gunfire on School Grounds in the United States*, EVERYTOWN FOR GUN SAFETY, everytownresearch.org/gunfire-in-school/ (last visited June 21, 2019). More than 228,000 children at 234 primary and secondary schools have experienced gun violence on their campus since the 1999 Columbine shooting. *More Than 228,000 Students Have Experienced Gun Violence at School Since Columbine*, WASH. POST, www.washingtonpost.com/graphics/2018/local/school-shootings-database/?utm_term=.6b0520326e58 (last visited June 20, 2019) [hereinafter Washington Post School Shooting Database] (This count excludes “[s]hootings at after-hours events, accidental discharges that caused no injuries to anyone other than the person handling the gun, and suicides that occurred privately or posed no threat to other children.”).

24. Antonis Katsiyannis et al., *Historical Examination of United States Intentional Mass School Shootings in the 20th and 21st Centuries: Implications for Students, Schools, and Society*, 27 J. CHILD & FAM. STUD. 2562 (2018).

25. Michael Siegel, *POV: Gun Control, Another Place Where Race Matters*, BU TODAY (June 17, 2016), www.bu.edu/today/2016/gun-violence-race/.

homicide rate is significantly higher for black Americans than other races. A black person living in Wisconsin, for example, is *twenty-six times more likely* to be killed by a gun than a white person.²⁶ The disparity is particularly prevalent in urban areas²⁷ and for black males.²⁸

America's gun violence problem also targets U.S. youth. Firearm injuries are the third leading cause of death among all children aged 1-17²⁹ and the second for youth aged 15-29, who account for a shocking 57% of all gun-related homicides in the United States.³⁰ Accidental firearm deaths are one of the top seven causes of *all* unintentional deaths for children ages 1-14.³¹ These numbers have trended upwards in recent years³² and represent a uniquely American problem – among high-income countries, one study estimates that over 90% of all firearm deaths among children aged 0-14 occur in the United States.³³ Here too, communities of color are disproportionately victimized. Compared to their white peers, black children are nearly *ten times* more likely,³⁴ the young black population

26. Molly Pahn et al., *Gun Violence in the US Kills More Black People and Urban Dwellers*, THE CONVERSATION (Nov. 8, 2017), theconversation.com/gun-violence-in-the-us-kills-more-black-people-and-urban-dwellers-86825 (using data from 2015).

27. In urban areas, Black Americans are 8 times more likely to be killed by firearms than their white counterparts. *Id.*

28. Black males are about 14 times more likely than non-Hispanic white men to be killed with a firearm in the United States. CDC WONDER, *supra* note 16, *About underlying cause of death, 1999-2016* (Dec. 2017). See also Corinne A. Riddell et al., *Comparison of Rates in Firearm and Nonfirearm Homicide and Suicide in Black and White Non-Hispanic Men, by U.S. State*, 168 ANNALS INTERNAL MED. 712 (2018). Black individuals are also more likely to know someone who has been shot or threatened with a gun, or to have been threatened with a gun themselves. Parker et al., *supra* note 11.

29. Katherine Fowler et al., *Childhood Firearm Injuries in the United States*, 140 AM. ACAD. PEDIATRICS 1, 2 (2017).

30. CHELSEA PARSONS ET AL., CTR. FOR AM. PROGRESS, AMERICA'S YOUTH UNDER FIRE (May 4, 2018), www.americanprogress.org/issues/guns-crime/reports/2018/05/04/450343/americas-youth-fire/. This group is also victimized by gun crime at a rate that is 69% higher than the national average. *Id.*

31. CDC WISQARS, *supra* note 3, *10 Leading Causes of Unintentional Injury Deaths – 2016*, www.cdc.gov/injury/images/lc-charts/leading_causes_of_death_highlighting_unintentional_2016_1040w800h.gif.

32. See PROTECT CHILDREN NOT GUNS FACTSHEET - 2016 CHILD GUN DEATHS, CHILD.'S DEF. FUND (2018), www.childrensdefense.org/wp-content/uploads/2018/08/cdf-protect-children-not-guns.pdf.

33. Erin Grinshteyn & David Hemenway, *Violent Death Rates: The US Compared with Other High-income OECD Countries, 2010*, 129 AM. J. MED. 266, 269 (2016) (based on data from 2010, the most recent year with complete data for the greatest number of countries).

34. Fowler, *supra* note 29, at 4.

aged 15-29 is *eighteen times* more likely,³⁵ and young black women are *six times* more likely to become gun homicide victims.³⁶ Likewise, black students make up only 16.6% of the school population but experience school shootings at twice that rate.³⁷

The proliferation of guns in the United States also affects suicide rates.³⁸ Suicide was the tenth leading cause of death in the United States in 2017,³⁹ and guns were the weapon of choice in more than fifty percent of those deaths.⁴⁰ Child firearm suicide rates have drastically increased in recent years.⁴¹ The availability of a firearm is a crucial factor in whether a suicide will be attempted⁴² and whether it will be fatal – 82.5% of attempted suicides with firearms result in death.⁴³ Given easy access to firearms, it is unsurprising that U.S. firearm suicide rates are among the highest in the world.⁴⁴

35. Parsons et al., *supra* note 30 (using CDC data from 2007-2016).

36. *Id.*

37. Washington Post School Shooting Database, *supra* note 23.

38. There are nearly twice as many gun suicides as gun homicides. CDC WONDER, *supra* note 16, *Underlying Cause of Death, Results: Firearm Deaths by Intent (1999-2017)*. About 35% of all global firearm suicide deaths in 2016 were in the United States. Frederick P. Rivara, David M. Studdert & Garen J. Wintemute, *Firearm-Related Mortality: A Global Public Health Problem*, 320 [J]AMA 764 (2018); Mohsen Naghavi et al., *Global Mortality From Firearms, 1990-2016*, 320 [J]AMA 792 (2018). See generally *The Relationship Between Firearm Availability and Suicide*, RAND CORPORATION, www.rand.org/research/gun-policy/analysis/supplementary/firearm-availability-suicide.html (last accessed Mar. 11, 2019).

39. CDC WISQARS, *supra* note 3, (return to “WISQARS Home; then continue to the “Fatal Injury Data” hyperlink; follow the “Leading Causes of Death 1981-2017” hyperlink and perform a query for 2017).

40. Riddell et al., *supra* note 28.

41. Fowler, *supra* note 29 (rates of child firearm suicides increased 60% from 2007- 2014).

42. Several studies have found a correlation between firearm availability and suicide attempts. See, e.g., Matthew Miller et al., *Firearm Availability and Suicide, Homicide, and Unintentional Firearm Deaths Among Women*, 79 J. URBAN HEALTH 26, 26 (2002); Michael Siegel & Emily F. Rothman, *Firearm Ownership and Suicide Rates Among US Men and Women, 1981–2013*, 106 AM. J. PUBLIC HEALTH 1316, 1316 (2016); Douglas J. Wiebe, *Homicide and Suicide Risks Associated with Guns in the Home: A National Case-Control Study*, 41 ANNALS EMERGENCY MED. 771, 780 (2003); Garen J. Wintemute et al., *Mortality Among Recent Purchasers of Handguns*, 341 NEW ENG. J. MED. 1583, 1583 (1999).

43. This is compared to a lethality rate of 1.5% for drug/poison ingestion, 61.4% for suffocation/hanging, and 34.5% for jumping. See Rebecca S. Spicer & Ted R. Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method*, 90 AM. J. PUB. HEALTH 1885, 1888 (Dec. 2000).

44. Grinshteyn & Hemenway, *supra* note 33 (U.S. firearm suicide rates were eight times higher than other high-income countries in 2010).

Firearms also aggravate the incidence and severity of domestic violence in the United States. Women in the United States are *twenty-one times* more likely to be murdered with a gun than in other developed countries,⁴⁵ usually as a result of domestic violence.⁴⁶ Most intimate partner homicides are committed with a gun,⁴⁷ and studies have found that women are five times more likely to be killed if their abuser owns a firearm.⁴⁸ The use of a gun during a domestic violence assault makes death twelve times more likely.⁴⁹

Fatal police shootings are another key area of concern, taking the lives of nearly 1,000 people in the United States in 2018, one-third of whom were aged twenty-nine or younger.⁵⁰ People of black, Hispanic, and Native American backgrounds are disproportionately killed by police, and victims of color are on average younger than white victims.⁵¹ As one reporter notes, “[e]ach of these deaths . . . has a significant impact on the community and its relationship with law enforcement These police shootings are a core part of what gun violence looks like in many communities across the country.”⁵² The criminal justice system finds most fatal police shootings to be justified and charges are rarely brought against the officers involved.⁵³

“Stand Your Ground” laws also play a role in how people in America

45. Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the other High-Income Countries, 2015*, 123 PREVENTATIVE MED. 20 (2019).

46. VIOLENCE POL’Y CTR., WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2011 HOMICIDE DATA 6 (2013), www.vpc.org/studies/wmmw2013.pdf.

47. April Zeoli et al., *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Association with Intimate Partner Homicides*, 187 AM. J. EPIDEMIOLOGY 2365 (2018).

48. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (July 2003).

49. Linda E. Saltzman et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 [J]AMA 3043 (1992).

50. *Fatal Force*, WASH. POST, www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?noredirect=on&utm_term=.1d6a08acfd2e (last visited Jan. 3, 2019).

51. Anthony L. Bui et al., *Years of Life Lost Due to Encounters with Law Enforcement in the USA, 2015–2016*, 72 J. EPIDEMIOL. COMMUNITY HEALTH 715, 716 (2018). Most of these deaths are with firearms. *The Counted*, THE GUARDIAN, www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database (last visited Mar. 6, 2019).

52. Parsons et al., *supra* note 30.

53. See Madison Park, *Police Shootings: Trials, Convictions are Rare for Officers*, CNN, www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html (last updated Oct. 3, 2018).

experience gun violence, particularly for populations of color. These laws expand the common law “castle doctrine” to allow a person to use deadly force for self-defense in areas where they are lawfully permitted to be, including public spaces, regardless of whether the other person is armed.⁵⁴ Although there are no federal Stand Your Ground laws they are found in at least twenty-eight states. These laws are of recent vintage, with all but two having been enacted since 2005,⁵⁵ and appear to be fueling an increase in firearm homicide rates.⁵⁶ Race is a significant factor in whether a defendant charged with a homicide has a successful Stand Your Ground defense: studies have found that a killing is 281% more likely to be found justified under a Stand Your Ground law when the attacker is white and the victim is black.⁵⁷ Defendants in Stand Your Ground cases are also twice as likely to be convicted if the victim is white as opposed to if the victim is black or Latino.⁵⁸

The percentage of the U.S. population owning guns has decreased in recent years, yet the number of civilian firearms in circulation in the

54. The “castle doctrine” stipulates that a person does not have a duty to retreat when he is attacked in his own home and has a right to use lethal force against intruders. *See generally*, American Bar Association, *National Task Force on Stand Your Ground Laws – Report and Recommendations* (Sept. 2015), www.americanbar.org/content/dam/aba/images/diversity/SYG_Report_Book.pdf. For a history of the evolution of self-defense in the United States, including its racialized aspects and complex social and legal history, see CAROLINE LIGHT, *STAND YOUR GROUND: A HISTORY OF AMERICA’S LOVE AFFAIR WITH LETHAL SELF-DEFENSE* (2017).

55. “*Stand Your Ground*” Laws, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/ (last visited Apr. 15, 2019).

56. Florida’s Stand Your Ground law is associated with a 32% increase in firearm homicide. David K. Humphreys et al., *Evaluating the Impact of Florida’s “Stand Your Ground” Self-Defense Law on Homicide and Suicide by Firearm: an Interrupted Time Series Study*, 177 [J]AMA INTERN MED. 44 (2017). States with Stand Your Ground laws witnessed a 53% average increase in the justifiable homicide rate after the law’s passage, compared to a 5% decline over the same period in states which did not enact the law. NATIONAL URBAN LEAGUE, MAYORS AGAINST ILLEGAL GUNS & VOTEVETS.ORG, *SHOOT FIRST: ‘STAND YOUR GROUND’ LAWS AND THEIR EFFECT ON VIOLENCE CRIME AND THE CRIMINAL JUSTICE SYSTEM* (2013), everytownresearch.org/documents/2015/04/shoot-first.pdf.

57. JOHN ROMAN, RACE, JUSTIFIABLE HOMICIDE, AND STAND YOUR GROUND LAWS: ANALYSIS OF FBI SUPPLEMENTARY HOMICIDE REPORT DATA, URBAN INST. 9 (2013), www.urban.org/UploadedPDF/412873-stand-your-ground.pdf.

58. Nicole Ackermann et al., *Race, Law, and Health: Examination of ‘Stand Your Ground’ and Defendant Convictions in Florida*, 142 SOC. SCI. & MED. 194, 194 (2015); Valerie Purdie-Vaughns & David R. Williams, *Stand-Your-Ground is Losing Ground for Racial Minorities’ Health*, 147 SOCIAL SCI. & MED. 341 (2015).

United States has grown.⁵⁹ Most gun owners cite the need for protection as a primary reason for having a gun.⁶⁰ However, experts agree that owning a gun increases the risk of death and injury to oneself and others.⁶¹ Indeed, studies repeatedly find that having a gun in the home increases the probability of homicide,⁶² suicide,⁶³ and accidental death.⁶⁴

Despite the popular belief that mental illness is a chief culprit of gun violence, the relationship is far from clear.⁶⁵ The United States does not appear to have higher levels of mental illness than other countries, suggesting that it is easy access to guns, not mental illness, which drives the country's high fatality rates. Yet while mental illness may not be *causing* the U.S. gun violence crisis, it is undoubtedly aggravated by it. Gunshot survivors experience twice the rate of post-traumatic stress disorder (PTSD) than those injured in motor vehicle accidents,⁶⁶ and have elevated risks for other mental health disorders, including depression and anxiety.⁶⁷ Beyond that, the mental and psychological harms of gun

59. Aaron Karp, *Estimating Global Civilian-held Firearms Numbers*, SMALL ARMS SURVEY 3-4 (2018), www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Civilian-Firearms-Numbers.pdf. It is estimated that there are 120.5 civilian guns per 100 persons in the United States. The second highest-ranked country for gun ownership was Yemen, with 52.8 guns per 100 people. *Id.*

60. Parker et al., *supra* note 11. See also Justice McCarthy, *More Than Six in 10 Americans Say Guns Make Homes Safer*, GALLUP (Nov. 7, 2014), news.gallup.com/poll/179213/six-americans-say-guns-homes-safer.aspx.

61. See Lisa M. Hepburn & David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 AGGRESSION & VIOLENT BEHAV. 417 (2004) (review of most-cited and representative empirical studies).

62. Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084, 1088-89 (1993); Wiebe, *Homicide and Suicide Risks*, *supra* note 42. See also Campbell et al., *supra* note 48.

63. See sources cited *supra* note 42.

64. Douglas J. Wiebe, *Firearms in US Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711, 713 (2003). See generally *How Gun Policies Affect Unintentional Injuries and Deaths*, RAND CORPORATION, www.rand.org/research/gun-policy/analysis/unintentional-injuries.html (last accessed Mar. 11, 2019).

65. See, e.g., GUN VIOLENCE AND SERIOUS MENTAL ILLNESS (Liza H. Gold & Robert I. Simon eds., 2016). See also Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 368 (2015); Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUBLIC HEALTH, 240 (2015).

66. Carol Reese et al., *Screening for Traumatic Stress Among Survivors of Urban Trauma*, 73 J. TRAUMA ACUTE CARE SURG. 462, 462 (2012).

67. Arlene I. Greenspan & Arthur L. Kellermann, *Physical and Psychological Outcomes 8 Months after Serious Gunshot Injury*, 53 J. TRAUMA 709 (2002); Andrew J. Michaels et al., *Posttraumatic Stress Disorder After Injury: Impact on General Health Outcome and Early Risk Assessment*, 47 J.

violence impact survivors' families, communities, and even indirectly exposed populations, particularly in the wake of mass shootings.⁶⁸ The effect on children is of particular concern.

Research shows that even *exposure* to violence, or learning that a friend or loved one has been exposed to violence, is associated with negative mental health consequences.⁶⁹ Witnessing gun violence, including seeing someone threatened with a gun, is associated with negative psychological outcomes.⁷⁰ The consequences of violence exposure are particularly true for children and may result in “lasting physical, mental, and emotional harm,” even if they are not physically present.⁷¹ Yet nearly 3 million children in the United States witness a shooting each year.⁷² Experiencing,

TRAUMA 460 (1999); Douglas Zatzick, *Interventions for Acutely Injured Survivors of Individual and Mass Trauma*, in TEXTBOOK OF DISASTER PSYCHIATRY, 190 (Robert J. Ursano et al., eds., 2007).

68. Sarah R. Lowe & Sandro Galea, *The Mental Health Consequences of Mass Shootings*, 18 TRAUMA, VIOLENCE & ABUSE 62 (2017) (review of forty-nine empirical studies finding that mass shootings are associated with a variety of adverse psychological outcomes in survivors, members of affected communities, and indirectly exposed populations); Shultz, *supra* note 19 (a review of scientific literature from 2010-2014 showing that mental health effects of mass shootings included psychological distress and clinically significant elevations in posttraumatic stress, depression, and anxiety symptoms, and that these repercussions extended to the surrounding affected community).

69. Sarah R. Lowe et al., *Trauma as a Public Health Issue: Epidemiology of Trauma and Trauma-Related Disorder*, in EVIDENCE BASED TREATMENTS FOR TRAUMA-RELATED PSYCHOLOGICAL DISORDERS A PRACTICAL GUIDE FOR CLINICIANS 11 (Ulrich Schnyder & Marylene Cloitre eds., 2015). See, e.g., Christine A. Henriksen et al., *The Psychological Impact of Terrorist Attacks: Examining a Dose-Response Relationship Between Exposure to 9/11 and Axis I Mental Disorders*, 27 DEPRESSION & ANXIETY 993 (2010) (showing this phenomenon through the effect of 9/11 on mental health; it has also been observed after the Oklahoma City bombings and other acts of violence.).

70. See, e.g., Karen Slovak & Mark Singer, *Rural Youth Gun Exposure and Trauma*, 16 VIOLENCE & VICTIMS 389, 396 (2001).

71. DAVID FINKELHOR ET AL., OFF. OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 227744, CHILDREN'S EXPOSURE TO VIOLENCE: A COMPREHENSIVE NATIONAL SURVEY 2 (2009); Charles McCoy et al., *Children's Cognitive Performance and Selective Attention Following Recent Community Violence*, 56 J. HEALTH SOC. BEHAV. 19 (2015) (anxiety levels rise and cognitive function decreases among school children after a violent crime occurs within a half mile of their home); Catherine C. McDonald & Therese R. Richmond, *The Relationship Between Community Violence Exposure and Mental Health Symptoms in Urban Adolescents*, 15 J. PSYCHIATRIC & MENTAL HEALTH NURSING 833 (2008); Richard Spano, Craid Rivera & John M. Bolland, *Are Chronic Exposure To Violence and Chronic Violent Behavior Closely Related Developmental Processes During Adolescence?* 37 CRIM. JUSTICE & BEHAVIOR 1160, 1175 (2010) (“Youth with a trajectory of chronic exposure to violence were 31.5 times, or 3,150%, more likely to also have a trajectory of chronic violent behavior across the 5-year time period”).

72. A survey of childhood exposure to violence estimates that 4% of children were exposed to a shooting in the year previous to the study. Using the total childhood population (ages 0-17) of the United States in 2015 (~73.6 million), this equates to roughly 2.944 million children. David Finkelhor

witnessing, or being in the proximity of violent crime and gun violence “can have serious snowball effects in education, health, incarceration, family instability, and social capital.”⁷³ Yet attention to and funding for this aspect of the crisis is lacking.⁷⁴

School shootings are especially harmful and result in a generalized fear of school⁷⁵ – which most children are nonetheless required to attend. A recent study found that 57% of teenagers in the United States now fear a school shooting.⁷⁶ Indeed, following the deadly shooting at Santa Fe High School, a seventeen-year-old student remarked in an interview that she was not surprised that a shooting occurred on her campus, saying “[i]t’s been happening everywhere. I’ve always felt it would eventually happen here, too.”⁷⁷ School shootings also have troubling psychological consequences which may be detrimental to development⁷⁸ and which are exacerbated by constant mass-media coverage and social media activity.⁷⁹

The proposals typically advanced following school shootings do little to diminish these harmful effects and instead often exacerbate them.⁸⁰

et al., *Prevalence of Childhood Exposure to Violence, Crime, and Abuse: Results from the National Survey of Children’s Exposure to Violence*, 169 [J]AMA PEDIATRICS 746, 751 (2015).

73. Richard V. Reeves & Sarah Holmes, *Gun and Race: The Different Worlds of Black and White Americans*, BROOKINGS (Dec. 15, 2015), www.brookings.edu/blog/social-mobility-memos/2015/12/15/guns-and-race-the-different-worlds-of-Black-and-white-americans/.

74. See, e.g., Lois Beckett, *The PTSD Crisis That’s Being Ignored: Americans Wounded in Their Own Neighborhoods*, PROPUBLICA (Feb. 3, 2014), www.propublica.org/article/the-ptsd-crisis-thats-being-ignored-americans-wounded-in-their-own-neighbor (finding in a survey of a top-level trauma center in each of the 21 cities with the country’s highest homicide rates, only one screened all seriously injured patients for PTSD at the time of the study. Moreover, the federal government, which provides guidance on best practices for patient care and funding, does not provide guidance to hospitals regarding post-gun violence PTSD screening).

75. See, e.g., Lynn A. Addington, *Students’ Fear after Columbine: Findings from a Randomized Experiment*, 19 QUANTITATIVE CRIMINOLOGY 367, 379 (2003) (finding an increased level of fear at school nationwide among students aged 12-18 following the Columbine school shooting).

76. Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern*, PEW RESEARCH CTR. (Apr. 18, 2018), <https://pewrsr.ch/2HrmMif>.

77. Marwa Eltagouri, *A Santa Fe Shooting Survivor’s Reaction has Shaken People around the Country*, WASH. POST (May 18, 2018), www.washingtonpost.com/news/post-nation/wp/2018/05/18/i-always-felt-it-would-eventually-happen-here-a-santa-fe-high-school-survivors-reaction-to-the-shooting/?utm_term=.fd1004152e69.

78. See Shultz, *supra* note 19, at 10-11.

79. See, e.g., Carolyn R. Fallahi & Sally A. Lesik, *The Effects of Vicarious Exposure to the Recent Massacre at Virginia Tech*, 1 PSYCHOL. TRAUMA: THEORY, RES., PRAC. & POL’Y 220, 226-27 (2009).

80. See generally RESPONDING TO SCHOOL VIOLENCE: CONFRONTING THE COLUMBINE EFFECT (Glenn W. Muschert et al., eds., 2014). See Philip T.K. Daniel, *Violence and the Public Schools:*

Increasing numbers of students are required to take part in active shooter drills at school. These are implemented with varying degrees of realism and students often do not know whether they are experiencing a drill or a real active shooter. Some drills have students barricade themselves in locked classrooms, silently huddled under desks while an administrator jiggles door handles to simulate an attacker trying to enter the classroom. Other schools take the simulation to an even more extreme, and possibly traumatizing, level to make the situation as realistic as possible. One CBS News report describes a particularly disturbing active shooter drill: “Police are invited into schools to act as ‘perpetrators’ wearing black face masks, shooting off blanks that simulate gunshots, stalking students and ‘shooting’ them with air guns to create victims with fake blood. To make the situation as real, and chaotic, as possible, they’re accompanied by emergency teams.”⁸¹

These drills inflict fear and trauma on an already vulnerable population and remind children that someone might try to kill them while they are in school. As one researcher explains:

The more prepared we are, the more heightened our sense of risk. And one potential effect we haven’t considered is how these kinds of preparedness activities affect kids psychologically and could increase a sense of feeling at risk. They really expand the ways in which we feel increasingly under siege.⁸²

Student Rights Have Been Weighed in the Balance and Found Wanting, 27 J. L. & EDUC. 573 (1998). See, e.g., PROTECT CHILDREN, NOT GUNS, THE TRUTH ABOUT GUNS, CHILD.’S DEF. FUND (2018), www.childrensdefense.org/wp-content/uploads/2018/07/the-truth-about-guns.pdf (the presence of armed police at school can have negative consequences, including the criminalization of children – especially Black and Latino children – at increasingly younger ages).

81. Ed Leefeldt, *Are Active Shooter Drills Too Scary for Schoolchildren?*, CBS NEWS (Nov. 30, 2017, 5:00 AM), www.cbsnews.com/news/active-shooter-drills-lockdowns-too-scary-for-schoolchildren/. See also, e.g., *Alaska High School Simulates Gunfire in Active Shooter Drills*, CNN (Mar. 12, 2018), www.cnn.com/videos/us/2018/03/12/alaska-high-school-simulates-gunfire-in-active-shooter-drills-orig-llr.cnn (during an active shooter drill at a high school in Anchorage, Alaska, a police officer shot blanks in the hallways to create the sound of real gunfire); Erika Christakis, *Active-Shooter Drills Are Tragically Misguided*, THE ATLANTIC (Mar. 2019), www.theatlantic.com/magazine/archive/2019/03/active-shooter-drills-erika-christakis/580426/.

82. James Hamblin, *What Are Active-Shooter Drills Doing to Kids? The Psychological Effects of Realistic Simulations Could Be Dangerous*, THE ATLANTIC (Feb. 28, 2018), www.theatlantic.com/health/archive/2018/02/effects-of-active-shooter/554150/ (quoting Colleen Derkatch, an associate professor at Ryerson University in Toronto).

Moreover, active shooter drills, as well as increasing the number of armed individuals on school grounds, are not necessarily effective at preventing school shootings – as the tragedies at Santa Fe High School and Parkland have shown.⁸³

II. THE UNITED STATES REGULATORY FRAMEWORK

A. Federal Legislation on Firearms

In the United States, guns are regulated by both federal and state law. The primary federal statutes regulating guns are the National Firearms Act of 1934⁸⁴ and the Gun Control Act of 1968,⁸⁵ which are mainly enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). A review of federal regulations related to firearms and their oversight reveals a consistent trend of loosening regulations and restrictions,⁸⁶ and the last major piece of federal gun control legislation was adopted more than two decades ago. This seems to result largely from the lobbying efforts of the

83. Santa Fe High School had active shooter drills and armed police officers on campus, yet a student was able to bring a firearm into a school building and shoot 23 people in his roughly 25-minute rampage. See Holly Yan, *Santa Fe High School had Armed Cops and Active Shooter Drills. Yet 10 People Died*, CNN (May 22, 2018, 11:46 AM), www.cnn.com/2018/05/21/us/santa-fe-high-school-preparations-trnd/index.html. Parkland had completed a schoolwide upgrade to their emergency plans and trained students for an active shooter a month before it became home to the deadliest U.S. high school shooting in history. See This American Life, *Episode 659: Before the Next One*, www.thisamericanlife.org/659/transcript. Similarly, Columbine had an armed guard on school grounds and Virginia Tech had a full campus police force.

84. I.R.C. §§ 5801-5872 (2018).

85. 18 U.S.C. § 921 (2018).

86. Agencies tasked with enforcing gun laws are also handicapped by limited funding, poor support, and a lack of cooperation. See, e.g., Louis Beckett, *Gun Laws that Cost Millions had Little Effect Because They Weren't Enforced*, THE GUARDIAN (Oct. 13, 2017, 7:00 AM), www.theguardian.com/us-news/2017/oct/13/gun-laws-that-cost-two-state-lawmakers-their-seats-had-little-effect-study-finds. This has contributed to the poor enforcement of gun control laws. For example, the shooter in Emanuel AME Church shooting in Charleston, South Carolina purchased the pistol used despite a misdemeanor for drug possession which should have barred him and the Sutherland Springs church shooter passed two federal background checks despite a prior assault conviction and a bad conduct Air Force discharge. See Larry Buchanan et al., *How They Got Their Guns*, N.Y. TIMES (Feb. 16, 2018), www.nytimes.com/interactive/2015/10/03/us/how-mass-shooters-got-their-guns.html.

National Rifle Association (NRA),⁸⁷ which has made loosening America's gun laws its top priority, campaigning against politicians supporting even modest gun control laws.⁸⁸

Under the Gun Control Act (GCA) of 1968, it is unlawful for anyone except a licensed dealer to engage "in the business" of selling firearms.⁸⁹ However, any "person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms" is outside licensing requirements⁹⁰ and can operate without adhering to important regulations mandated to other sellers. An estimated 40% of gun sales in the United States occur through these private transactions – such as when guns are purchased at gun shows, over the internet, or through classified advertisements.⁹¹

Although the Brady Handgun Violence Prevention Act of 1993 (the Brady Act)⁹² implemented the National Instant Criminal Background Check System (NICS), it only requires background checks for gun purchases from a licensed dealer,⁹³ and it does not apply to the 40% of transactions that occur privately.⁹⁴ This private market is a leading source of guns used in crimes,⁹⁵ because "individuals prohibited by law from

87. The NRA, founded in 1871, is one of the most powerful lobby organizations in the United States. Although today the organization aggressively lobbies, raises money, and organizes large campaigns to block any federal and state law or policy that restricts access to guns, for its first 100 years, the NRA was primarily known for promoting the safe and proper use of firearms and worked with the government on the implementation of reasonable gun control laws, such as requirements for state-level permits for concealed weapons and gun dealer registration. It was not until a 1970s power struggle and change in leadership that the NRA began to strictly oppose all forms of gun control. See Ron Elving, *The NRA Wasn't Always Against Gun Restrictions*, NPR (Oct. 10, 2017), www.npr.org/2017/10/10/556578593/the-nra-wasnt-always-against-gun-restrictions.

88. See generally WINNIE STACHELBERG, ARKADI GERNEY & CHELSEA PARSONS, CTR. FOR AM. PROGRESS, BLINDFOLDED, AND WITH ONE HAND TIED BEHIND THE BACK 3-5 (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/03/GunRidersBrief-7.pdf>.

89. 18 U.S.C. § 922(a)(1)(A) (2018).

90. 18 U.S.C. § 921(a)(21)(C) (2018).

91. PHILIP J. COOK & JENS LUDWIG, U.S. DEP'T. OF JUST., NCJ 165476, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 6-7 (1997), www.ncjrs.gov/pdffiles/165476.pdf.

92. 18 U.S.C. §§ 921-924, 925A; 42 U.S.C. § 3759 (2012).

93. 18 U.S.C. § 922(t) (2012).

94. Cook & Ludwig, *supra* note 91, at 6-7.

95. Garen J. Wintemute et al., *Private-Party Gun Sales, Regulation, and Public Safety*, 363 NEW ENG. J. MED. 508, 509 (2010).

possessing guns can easily obtain them from private sellers and do so without any federal records of the transactions.”⁹⁶ Additionally, if the FBI is unable to complete a background check in three days, the dealer can automatically complete the firearm transfer.⁹⁷ Yet universal background checks are shown to reduce firearm-related violence.⁹⁸

Among licensed dealers, oversight has been sharply curtailed even as gun violence has increased. The Firearms Owners’ Protection Act of 1986 (FOPA)⁹⁹ repealed provisions of the GCA related to the regulation of ammunition sales and prevented ATF agents from conducting regular compliance inspections of dealers.¹⁰⁰ One study found that, on average, dealers are inspected only *once every decade*.¹⁰¹ Moreover, since 1979, the ATF has also been *prohibited* from compiling records of gun sales into a centralized and searchable database.¹⁰² The Tiahrt Amendments¹⁰³ – which have been attached to the U.S. Department of Justice appropriations bill every year since 2003 – prohibit the ATF from requiring dealers to submit

96. U.S. DEP’T OF JUSTICE, OFF. OF THE INSPECTOR GEN., I-2011-001, REVIEW OF ATF’S PROJECT GUNRUNNER 10 (2010), www.justice.gov/oig/reports/ATF/e11101.pdf.

97. 18 U.S.C. § 922(t)(1) (2012).

98. Comprehensive, universal background checks have been linked to decreases in firearm homicides, fewer women shot to death by intimate partners, fewer police officers killed on duty, fewer mass shootings, and reduced suicide rates. See Michael D. Anestis et al., *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, 105 AM. J. PUB. HEALTH 105, e1, e3 (2015); EVERYTOWN FOR GUN SAFETY, BACKGROUND CHECKS REDUCE GUN VIOLENCE AND SAVE LIVES (2017), https://everytownresearch.org/wp-content/uploads/2017/01/Background-Check-FactSheet_011317_5.pdf; EVERYTOWN FOR GUN SAFETY, *New Research: States with Background Checks Experience Fewer Mass Shootings* (Nov. 12, 2015), <https://everytown.org/press/new-research-states-with-background-checks-experience-fewer-mass-shootings/>; Kara E. Rudolph, *Association between Connecticut’s Permit-to-Purchase Handgun Law and Homicides*, 105 AM. J. PUB. HEALTH 49, 49, 51 (2015); Daniel W. Webster et al., *Effects of the Repeal of Missouri’s Handgun Purchaser Licensing Law on Homicides*, 91 J. URB. HEALTH 293, 294 (2014). See also Cassandra K. Crifasi, *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 PREVENTATIVE MED. 43 (2015).

99. Firearms Owners’ Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (1986) (currently codified at 18 U.S.C. § 921).

100. ATF is only lawfully able to conduct one unannounced inspection of a gun dealer’s premise each year without a permit.

101. Sari Horwitz & James V. Grimaldi, *ATF’s Oversight Limited in Face of Gun Lobby*, WASH. POST (Oct. 26, 2010), www.washingtonpost.com/wp-dyn/content/article/2010/10/25/AR2010102505823.html.

102. Consolidated and Further Continuing Appropriations Act, 2012, Public Law 112-55, Division B, Title II (enacted November 18, 2011). See generally BLINDFOLDED, AND WITH ONE HAND TIED BEHIND THE BACK, *supra* note 88, at 3-5.

103. Consolidated Appropriations Act 2010, Pub. L. No. 111-117, 123 Stat. 3128-3129 (2009).

their inventories.¹⁰⁴ These restrictions defy repeated studies showing that such practices would make the diversion of guns to criminals less likely.¹⁰⁵

The Tiahrt Amendments also prohibit gun trace data – which is meant to track the custody of a firearm through the supply chain, from manufacturer to dealer to buyer – from being admissible as evidence in civil lawsuits against gun sellers or manufacturers, including in proceedings to revoke a corrupt dealer’s license. In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (PLCAA)¹⁰⁶ which gave the firearm industry special protection from civil liability afforded to no other industry.¹⁰⁷

The Tiahrt Amendments also require the FBI to destroy the records of all approved gun purchasers within twenty-four hours. When combined with FOIA’s prohibition of a centralized database of gun dealer records, this requirement hinders law enforcement’s ability to efficiently trace the ownership of guns used in crimes and makes it more difficult to retrieve firearms from gun owners who have subsequently become ineligible to possess guns.¹⁰⁸

In 2004, Congress allowed the 1994 Federal Assault Weapons Ban¹⁰⁹ to expire. Subsequently, AR-15 style assault rifles similar to those previously banned were used by gunmen in a host of horrific mass shootings, including the 2012 Sandy Hook elementary school massacre, the 2012 Aurora, Colorado movie theater shooting, the 2015 San Bernardino, California attack, the 2016 Pulse nightclub shooting in Orlando, Florida,

104. *Id.* The ATF can however request information regarding a particular firearm if the request is made in the course of a specific criminal investigation. 18 U.S.C. § 923(g)(7) (2018).

105. See Sadat & George, *supra* note 2, pp. 39-42, ¶ 69 and works cited.

106. 15 U.S.C. §§ 7901-7903 (2018).

107. The PLCAA protects the gun industry from liability in most tort actions and prohibits a “qualified civil liability action” from being brought in any state or federal court against a manufacturer or seller of firearms or ammunition if the action resulted from the criminal or unlawful misuse of their products, with certain exceptions. See Eliana Eitches, *The Protection of Lawful Commerce in Arms Act: Precipitating the World’s Most Dangerous Game 4* (May 2017) (unpublished manuscript), <https://ssrn.com/abstract=3009413>; *Gun Industry Immunity*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/ (last visited Apr. 15, 2019).

108. See *Maintaining Records of Gun Sales*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, lawcenter.giffords.org/gun-laws/policy-areas/gun-sales/maintaining-records-of-gun-sales/ (last visited Apr. 15, 2019).

109. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No 103-322, § 110102, 108 Stat.1796 (1994).

the 2017 Las Vegas music festival shooting, the 2017 Sutherland Springs, Texas church shooting, the 2018 Parkland school shooting, and the 2018 Pittsburgh synagogue shooting. In all but two of these examples, the shooter purchased his weapons legally.¹¹⁰ High-capacity and assault-style weapons are particularly pernicious as they can fire many rounds and cause wounds that are almost inevitably fatal.¹¹¹ This is also true of firearms modified by “bump stocks,” that enable weapons to fire shots in rapid succession, accelerating their rate of fire to mimic that of a fully automatic machine gun.¹¹² Following growing pressure on the government to ban bump stocks,¹¹³ the U.S. Justice Department issued a rule in December 2018 that applied existing prohibitions against fully automatic weapons to bump stocks, effectively banning them.¹¹⁴

110. The exceptions being the Sandy Hook shooting, where the shooter used his mother’s legally purchased guns, and the San Bernardino shooting, where the attackers had a third party purchase the weapons used, which were then modified to be illegal under California’s assault weapons ban. See Buchanan et al., *supra* note 86. See also Elizabeth Chuck, *More Than 80 Percent of Guns Used in Mass Shooting Obtained Legally*, NBC NEWS (Dec. 5, 2015, 5:02 PM), www.nbcnews.com/storyline/san-bernardino-shooting/more-80-percent-guns-used-mass-shootings-obtained-legally-n474441 (over the past three decades, 82% of the weapons used in mass shootings were purchased legally).

111. Indeed, when “high-capacity magazines – or assault weapons likely equipped with them” were used in a mass shooting, 155% more people were shot and 47% more people were killed. EVERYTOWN FOR GUN SAFETY, ANALYSIS OF RECENT MASS SHOOTINGS (2015), everytownresearch.org/documents/2015/04/analysis-of-recent-mass-shootings.pdf. See also Heather Sher, *What I Saw Treating the Victims from Parkland Should Change the Debate on Guns*, THE ATLANTIC (Feb. 22, 2018), www.theatlantic.com/politics/archive/2018/02/what-i-saw-treating-the-victims-from-parkland-should-change-the-debate-on-guns/553937/; Jessica Vomiero, *The Difference Between an AR-15 and Handgun can be Seen in the Bullet Wounds*, GLOBAL NEWS CANADA (Feb. 23, 2018), globalnews.ca/news/4043345/ar-15-handgun-bullet-wounds-difference/; Anthony A. Braga & Philip J. Cook, *The Association of Firearm Caliber With Likelihood of Death From Gunshot Injury in Criminal Assaults*, [J]AMA (2018), jamanetwork.com/journals/jamanetworkopen/fullarticle/2688536.

112. *The “Bump Stocks” Used in The Las Vegas Shooting May Soon Be Banned*, THE ECONOMIST (Oct. 6, 2017), www.economist.com/graphic-detail/2017/10/06/the-bump-stocks-used-in-the-las-vegas-shooting-may-soon-be-banned (“the devices increase a semi-automatic’s rate of fire by tenfold or more, from roughly 45-60 rounds per minute to 400-800”).

113. Margot Sanger-Katz & Quoc Trung Bui, *A Bump Stock Ban Is Popular With the Public. But Experts Have Their Doubts*, N.Y. TIMES (Oct. 12, 2017), www.nytimes.com/interactive/2017/10/12/upshot/a-bump-stock-ban-is-popular-but-experts-have-their-doubts.html (finding that a bump stock ban was supported by 72% of registered voters in a survey conducted following the Las Vegas shooting); Asma Khalid, *NPR Poll: After Parkland, Number of Americans Who Want Gun Restrictions Grows* (Mar. 2, 2018, 5:00 PM), www.npr.org/2018/03/02/589849342/npr-poll-after-parkland-number-of-americans-who-want-gun-restrictions-grows.

114. Bureau of Alcohol, Tobacco, Firearms, and Explosives & the Department of Justice, Rule on

Even laws that have been adopted have gaps in coverage. For example, the Domestic Violence Offender Gun Ban of 1996¹¹⁵ (the “Lautenberg Amendment”) prohibits *some* individuals who have been convicted of a “misdemeanor crime of domestic violence” from buying a firearm. However, it does not apply to dating partners who are not married, have not lived together, or who do not share a child, or to abusers who victimize family members other than an intimate partner or child, such as a parent or sibling. It bans gun ownership for anyone under a restraining order *only* if the defendant and the petitioner are intimate partners.¹¹⁶ The law does not ban convicted stalkers from owning firearms. Moreover, convicted abusers are not required to surrender firearms already in their possession. Yet a majority of Americans support prohibiting gun ownership for ten years after a person is convicted of domestic violence¹¹⁷ or of violating a restraining order,¹¹⁸ and these laws can save lives.¹¹⁹

Despite the common, but unsubstantiated belief, that gun violence is chiefly caused by mental illness, federal regulations keeping guns out of the hands of mentally ill persons are incomplete.¹²⁰ The Gun Control Act prohibits gun possession for reasons of mental illness only if a person has been committed to a mental institution¹²¹ or has been “adjudicated as a mental defective.”¹²² A diagnosis of severe mental illness, absent one of

Bump-Stock-Type Devices, 83 FR 66514 (2018).

115. 18 U.S.C. §922(g)(9) (2018).

116. To qualify as “intimate partners,” the defendant and petitioner must have had a sexual relationship *and* either lived together or share a child in common. 18 U.S.C. § 921(a)(32). For the law to apply, the restraining order must also restrain future contact, there must be a credible threat, and the defendant must have had the opportunity to be heard at a hearing. 18 U.S.C. § 922(g)(8).

117. Barry et al., *supra* note 11. Over 80% of people surveyed, including 75.6% of gun-owners, supported this proposal. *Id.*

118. *Id.* 73.7% of gun owners and 72.4% of non-gun owners surveyed supported this proposal. *Id.*

119. See Carolina Diez et al., *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS INTERNAL MED. 536, 536 (2017); April M. Zeoli & Daniel W. Webster, *Effects of Domestic Violence Policies, Alcohol Taxes, and Police Staffing Levels on Intimate Partner Homicide in Large US Cities*, 16 INJ. PREVENTION 90 (2010); Richardson Vigdor & James A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 EVALUATION REV. 313, 332 (2006); Campbell et al., *supra* note 48, at 1092.

120. See Sadat & George, *supra* note 2, pp. 47-48, ¶ 76 and works cited.

121. 18 U.S.C. § 922(g)(4) (2018). For the legal definition, see 27 C.F.R. §478.11 (2019).

122. 18 U.S.C. § 922(g)(4) (2018). This requires “[a] determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the capacity to

the two above requirements, does not otherwise impede the purchase or possession of firearms, even temporarily,¹²³ and recent federal actions have further undermined the regulation of firearms in relation to people with serious mental health concerns. In February 2017, President Trump signed H.J. Res. 40 into law,¹²⁴ repealing the Implementation of the NICS Improvement Amendments Act of 2007, which required stringent background checks for gun purchases by people with severe mental illness.¹²⁵ There is also no federal “red flag bill” allowing courts to issue temporary extreme risk protection orders to prevent individuals who exhibit signs that they pose a danger to themselves or others from possessing firearms.¹²⁶ An analysis of mass shootings nationwide from 2009-2016 found that at least 42% of the shooters exhibited warning signs before the attack.¹²⁷ These laws can also be an effective tool for preventing suicides.¹²⁸

Federal law does not mandate the use of secure gun storage or safety locking devices,¹²⁹ and only four states have laws requiring guns to be stored safely in some or all circumstances.¹³⁰ Safe storage laws can help

manage his own affairs. (b) The term shall include—(1) a finding of insanity by a court in a criminal case, and (2) those persons found incompetent to stand trial or found not guilty by lack of mental responsibility [under the Uniform Code of Military Justice].” 27 C.F.R. §478.11 (2018).

123. See, e.g., *U.S. v. Vertz*, 102 F. Supp.2d 787, 788 (W.D. Mich. 2000), *aff’d on other grounds*, 40 Fed. Appx. 69 (6th Cir. 2002).

124. Pub. L. No. 115-8, 131 Stat. 15 (2017).

125. Implementation of the NICS Improvement Amendments Act of 2007, 20 C.F.R. pt. 421 (2016).

126. See generally *Red Flag Laws: Helping Prevent Mass Shootings*, EVERYTOWN FOR GUN SAFETY (Feb. 14, 2019), <https://everytownresearch.org/wp-content/uploads/2018/02/2.20.19-Red-Flags-Mass-Shootings.pdf>. The Parkland shooter’s caretaker was so concerned about his mental state that she reported him to the police three times but was told they could not prevent him from possessing guns. See Richard Fausset & Serge F. Kovalski, *Nikolas Cruz, Florida Shooting Suspect, Showed ‘Every Red Flag.’* N.Y. TIMES (Feb. 15, 2018), www.nytimes.com/2018/02/15/us/nikolas-cruz-florida-shooting.html. In March 2018, a month after the Parkland shooting, Florida passed a red flag bill.

127. EVERYTOWN FOR GUN SAFETY, *MASS SHOOTINGS IN THE UNITED STATES: 2009-2016* 2 (2017), everytownresearch.org/wp-content/uploads/2017/04/Analysis_of_Mass_Shooting_062117.pdf.

128. Aaron J. Kivisto & Peter Lee Phalen, *Effects of Risk-Based Firearm Seizure Laws in Connecticut and Indiana on Suicide Rates, 1981–2015*, 69 *PSYCHIATRIC SERVICES* 855 (2018); Jeffrey W. Swanson et al, *Implementation and Effectiveness of Connecticut’s Risk-Based Gun Removal Law: Does it Prevent Suicides?*, 80 *LAW & CONTEMPORARY PROBLEMS* 179 (2017).

129. Child Safety Lock Act of 2005, 18 U.S.C. § 922(z) (2012). Although the Child Safety Lock Act of 2005 requires licensed dealers to provide a secure gun storage or safety device with any firearm sale or transfer, it doesn’t require it to be used and there are no federal regulations on the products’ designs. *Id.*

130. Massachusetts is the only state to require that all firearms are stored with a lock in place;

prevent suicides, accidental shootings, gun thefts that lead to further crime, and the use of guns by dangerous persons. The median age of school shooters is sixteen¹³¹ (too young to buy a firearm in any state) and the federal government has reported that in most school shootings, the gun used was taken from the shooter's home or that of a relative.¹³² An estimated one-third of all households with children have a gun in the home and in nearly half, the guns are not stored safely.¹³³ Children often know where the guns are kept and many have handled them without their parents' knowledge.¹³⁴ About 75% of adolescent firearm suicides involved a parent's gun¹³⁵ and most unintentional child firearm deaths occur at home when children are playing with a gun or confuse it with a toy.¹³⁶ Studies have found that safe storage practices can prevent these tragedies¹³⁷ and that child access prevention laws reduce accidental shootings and child suicides.¹³⁸

Research that could contribute to more effective policy, safety regulations, and innovations to make gun possession less dangerous, such

California, Connecticut, and New York have laws requiring guns to be kept locked in some circumstances.

131. Washington Post School Shooting Database, *supra* note 23.

132. U.S. SECRET SERV. & U.S. DEP'T OF EDUC., THE FINAL REPORT & FINDINGS OF THE SAFE SCHOOL INITIATIVE – IMPLICATIONS FOR THE PREVENTION OF SCHOOL ATTACKS IN THE UNITED STATES 27 (2004), www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf.

133. Cassandra K. Crifasi et al., *Storage Practices of US Gun Owners in 2016*, 108 AM. J. PUB. HEALTH 532, 532 (2018). See also Renee M. Johnson et al., *Are Household Firearms Stored Less Safely in Homes With Adolescents?: Analysis of a National Random Sample of Parents*, 160 ARCHIVES PEDIATRICS & ADOLESCENT MED. 788 (2006).

134. Frances Baxley & Matthew Miller, *Parental Misperceptions about Children and Firearms*, 160 ARCHIVES PEDIATRICS & ADOLESCENT MED. 542 (2006). See also Marjorie S. Hardy et al., *A Firearm Safety Program for Children: They Just Can't Say No*, 17 J. DEV. BEHAV. PEDIATR. 216 (1996); Geoffrey Jackson et al., *Seeing is Believing: What Do Boys Do When They Find a Real Gun?*, 107 PEDIATRICS 1247, 1249 (2001).

135. Renee M. Johnson et al., *Who Are the Owners of Firearms Used in Adolescent Suicides?*, 40 SUICIDE & LIFE THREATENING BEHAV. 609, 610 (2010); David C. Grossman et al., *Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm*, 153 ARCHIVES PEDIATRICS & ADOLESCENT MED. 875 (1999).

136. Fowler, *supra* note 29.

137. David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 [J]AMA 707 (2005); U.S. GEN. ACCT. OFF., GAO/PEMD-91-9, *ACCIDENTAL SHOOTINGS: MANY DEATHS AND INJURIES CAUSED BY FIREARMS COULD BE PREVENTED 17* (1991), www.gao.gov/assets/160/150353.pdf.

138. Daniel W. Webster, *Association Between Youth-Focused Firearm Laws and Youth Suicides*, 292 [J]AMA 594, 596 (2004).

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as integrated personalization technology or loaded chamber indicators, has been systematically stymied. The Tiahrt Amendments restrict cities, states, and academic researchers from accessing firearm trace data that could be used to make more informed policy, while the Dickey Amendment,¹³⁹ adopted by Congress in 1996, has effectively banned federally-funded research on firearms and gun violence prevention.¹⁴⁰ Meanwhile, the Consumer Product Safety Act of 1972 makes guns one of the only consumer products manufactured in the United States that is *not* subject to federal health and safety regulations and as such, guns are manufactured without federal oversight as to design or quality.¹⁴¹ Perhaps unsurprisingly, fatality rates from firearm injuries have *increased* while those caused by other common injuries and illnesses have decreased.¹⁴²

B. The Second Amendment and Gun Control

The paucity of federal gun control legislation is often attributed to the Second Amendment's requirement that "the right of the people to keep and bear Arms, shall not be infringed."¹⁴³ Yet for more than 200 years, it

139. In 1996, Congress pushed through language in an annual appropriations bill that prohibited funds allocated for "injury prevention and control" at the Centers for Disease Control to be used "to advocate or promote gun control." Omnibus Consolidated Appropriations Act (Dicky Amendment), Pub. L. No. 104-208, 110 Stat. 3009, 3009-244 (1997).

140. See Arthur L. Kellermann & Frederick P. Rivara, *Silencing the Silence on Gun Research*, 292 [J]AMA 549 (2013). The Dickey Amendment has led to a 96% drop in annual CDC funding for gun violence research. EVERYTOWN FOR GUN SAFETY, ACCESS DENIED: HOW THE GUN LOBBY IS DEPRIVING POLICE, POLICY MAKERS, AND THE PUBLIC OF THE DATA WE NEED TO PREVENT GUN VIOLENCE 4 (2013), <https://everytownresearch.org/documents/2015/04/access-denied.pdf>.

141. 15 U.S.C. § 2052(a)(5)(E) (2012).

142. See, e.g., Angela Sauaia et al., *Fatality and Severity of Firearm Injuries in a Denver Trauma Center, 2000-2013*, 315 [J]AMA 2465, 2465 (2016) (finding in a 13-year period at a Denver trauma center that in-hospital death rates from firearm injuries had increased "contrary to every other trauma mechanism"); *Vital Statistics Rapid Release: Quarterly Provisional Estimates*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/nchs/nvss/vsrr/mortality-dashboard.htm# (last updated Sept. 4, 2018) (showing firearms-injuries related deaths increased in 2017, while cancer and liver disease have decreased); Sy Mukherjee, *What's Killing Americans? These 2 Things, According to a New CDC Report*, FORTUNE MAGAZINE (Nov. 3, 2017), fortune.com/2017/11/03/american-deaths-drugs-guns-cdc/ (the rates of death from cancer and heart disease have declined, while deaths from gun violence have increased).

143. U.S. CONST. amend. II. The United States is one of only three countries that has such a right, the other two are Mexico and Guatemala. See David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 NYU L. REV. 762, 805-06 (2012).

was commonly understood that the Second Amendment did not confer a private right to bear arms,¹⁴⁴ but governed the right of states to have a militia. This was confirmed by the U.S. Supreme Court in 1886 in *Presser v. Illinois*,¹⁴⁵ and reaffirmed in 1939 in *United States v. Miller*. The *Miller* Court stated, in a unanimous decision, that the “obvious purpose” of the Second Amendment was “to assure the continuation and render possible the effectiveness” of state militia, and must be applied to that end.¹⁴⁶ In 1980, the U.S. Supreme Court declared that “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well-regulated militia’.”¹⁴⁷

In 2008, a split Court held, in *District of Columbia v. Heller*, that “the Second Amendment conferred an individual right to keep and bear arms.”¹⁴⁸ The Court was deeply divided, with both Justice Breyer and Justice Stevens issuing dissents. Following his retirement, Justice Stevens wrote that “*Heller* is unquestionably the most clearly incorrect decision that the Court announced during my tenure on the bench.”¹⁴⁹ Yet even in *Heller*, Justice Scalia, writing for the majority, noted that the right to bear arms “is not unlimited.”¹⁵⁰

Heller only addressed handguns that are in the home and used for

144. See Jason M. Larson, *Government Gone Wild: The Real Reason for the 2nd Amendment*, 4 PHOENIX L. REV. 911, 913-914 (2010-2011) (stating no federal appellate court had used the Second Amendment to protect private gun ownership until 2007). See also *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), cert. denied, 435 U.S. 926 (1978) (“Defendant . . . concludes that every citizen has the absolute right to keep arms. This broad conclusion has long been rejected.”).

145. *Presser v. Illinois*, 116 U.S. 252 (1886). See also *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269 (7th Cir. 1982) (“[i]t is difficult to understand how appellants can assert that *Presser* supports the theory that the Second Amendment right to keep and bear arms is a fundamental right which the state cannot regulate when the *Presser* decision plainly states [that the] Second Amendment does not apply to the states.”).

146. *United States v. Miller*, 307 U.S. 174, 178 (1939) (in a unanimous decision, the Court found that “[i]n the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”).

147. *Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1980) (quoting *Miller*, 307 U.S. at 178). See also *Hickman v. Block*, 81 F.3d 168 (9th Cir. 1996) (“[I]t is only in furtherance of state security that “the right of the people to keep and bear arms” is . . . proclaimed.”).

148. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

149. JOHN PAUL STEVENS, *THE MAKING OF A JUSTICE* 482 (2019).

150. *Heller*, 554 U.S. at 2786.

protection. It did not address other types of firearms, guns in public, or firearms owned for other purposes. While *Heller* applied the Second Amendment only to the federal government, in *McDonald v. City of Chicago*,¹⁵¹ the Supreme Court incorporated the Second Amendment interpretation of *Heller* into the Fourteenth Amendment Due Process Clause, making *Heller* effective against the states. Even so, more than 90% of Second Amendment challenges to gun control laws brought in state and federal courts in the decade after *Heller* have been rejected.¹⁵² Federal courts have upheld, for example, Maryland's assault weapons ban¹⁵³ and San Francisco's safe-storage law¹⁵⁴ and, in spite of the protestations of Justice Clarence Thomas,¹⁵⁵ have generally read *Heller* narrowly.¹⁵⁶ That may change in the future with the "Kavanaugh for

151. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

152. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, POST-HELLER LITIGATION SUMMARY 2 (2017), lawcenter.giffords.org/wp-content/uploads/2017/04/Post-Heller-Litigation-Summary-2017-April.pdf. See also Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433 (2018); Adam Winkler, *Heller's Catch-22*, 56 UCLA L. R. 1551, 1553 (2009) ("the newfound individual right [to keep and bear arms] has almost no significant effect on gun control").

153. See *Kolbe v. Hogan*, 849 F.3d 114, 140 (4th Cir. 2017). Federal courts have upheld challenges to assault weapon bans four times in the past decade, with the Supreme Court declining to hear an appeal in all instances. *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (upholding assault weapons bans in New York and Connecticut), *cert. denied sub nom Kampfer v. Cuomo*, 136 S. Ct. 2489 (2016); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*) (upholding D.C.'s assault weapons ban); *reh'g en banc denied*, 814 F.3d 480 (D.C. Cir. 2016) (mem.); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015) (upholding Highland Park's assault weapons ban), *cert. denied*, 136 S. Ct. 447 (2015).

154. See *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014) (upholding San Francisco's 2008 law prohibiting any person from keeping a handgun in a residence unless it is stored in a locked container or disabled with a trigger lock unless it is carried on the person).

155. Justice Thomas often dissented from the denial of certiorari on Second Amendment cases. See, e.g., *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from denial of certiorari) (writing that a law mandating a 10-day waiting period when purchasing a firearm should have been reviewed); *Friedman v. Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from denial of certiorari) (writing that a restriction on the possession or sale of semiautomatic weapons should have been reviewed); *Jackson v. San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari) (writing that a requirement that handguns be secured in a safe or with a trigger lock should have been reviewed). See Garrett Epps, *What Clarence Thomas Gets Wrong About the Second Amendment*, THE ATLANTIC (Feb. 22, 2018), www.theatlantic.com/politics/archive/2018/02/clarence-thomas-guns/553910.

156. See *Heller II*, 670 F.3d 1244, 1260 (stating the court will determine whether the ban is unconstitutional under the Supreme Court's *Heller* precedent primarily by assessing whether it impinges on the right to self-defense). See also *Hollis v. Lynch*, 827 F.3d 436, 445 (5th Cir. 2016) (finding the Second Amendment's individual right only applies to weapons in common use for lawful

Kennedy swap” at the Court, as Lee Epstein and David Konig note in their essay in this volume,¹⁵⁷ but for the time being, *Heller* is still largely “firing blanks.”¹⁵⁸

C. State and Municipal Legislation on Firearms

Some states have attempted to fill gaps in the federal regulatory scheme. Eleven states and the District of Columbia mandate comprehensive universal background checks for all sales and transfers of all classes of firearms at the point of sale¹⁵⁹ and thirteen states and the District of Columbia have some form of licensing or permitting requirement to purchase or own firearms – although half of these regulations apply only to handgun purchases.¹⁶⁰ Licensing requirements, particularly when coupled with background checks, can reduce gun violence¹⁶¹ and illegal trafficking in firearms¹⁶² and are supported by a majority of Americans.¹⁶³ Seventeen states and the District of Columbia now have some version of red flag bills¹⁶⁴ (and proposals are pending in at least twenty other

purposes and does not apply to machine guns, and that “self-defense, not revolution” is the essential protected right); *United States v. Mazarella*, 614 F.3d 85, 88 (3d Cir. 2010) (stating the key right protected under *Heller* is “the right to protect the hearth and home,” which allows state limitations); *Cf. Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015) (stating assault weapon bans are long-standing limitations accepted by *Heller*); *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010) (holding government limitations on gun rights must only be reasonable, not perfect, to be upheld).

157. Lee Epstein & David Konig, *The Strange Story of the Second Amendment in the Federal Courts, and Why It Matters*, 60 WASH. U. J.L. & POL’Y 147, 162 (2019). This is particularly so after the Court granted cert in *New York State Rifle & Pistol Association v. New York*, 86 F. Supp. 3d 249 (S.D.N.Y. 2015), *affirmed*, 883 F.3d 45 (2d Cir. 2018); *cert. granted*, 2019 WL 271961 (2019).

158. Epstein & Konig, *supra* note 157, at 163.

159. *Universal Background Checks*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks (last visited Feb. 18, 2019).

160. *Licensing*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/licensing (last visited Feb. 18, 2019).

161. *Supra* note 98.

162. See Daniel W. Webster et al., *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREVENTION 184, 188-89 (2001); MAYORS AGAINST ILLEGAL GUNS, TRACE THE GUNS: THE LINK BETWEEN GUN LAWS AND INTERSTATE GUN TRAFFICKING 17 (2010), www.tracetheguns.org/report.pdf.

163. Barry et al., *supra* note 11, at 1080-81.

164. *Extreme Risk Protection Orders*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#state> (last visited June 18, 2019).

states).¹⁶⁵ Seven states and the District of Columbia have adopted assault weapons bans and nine states have laws banning high-capacity ammunition magazines.¹⁶⁶ Within the past five years, California,¹⁶⁷ Connecticut,¹⁶⁸ and New York¹⁶⁹ have adopted or strengthened laws requiring that firearms be stored with a locking device in place if the owner lives with someone who is ineligible to possess firearms.¹⁷⁰

The Parkland shooting prompted some state legislatures and municipalities to adopt gun control measures. In 2018, sixty-seven gun safety bills were signed into law in twenty-six states and the District of Columbia, including bans on bump stocks in eight states, red flag bills in eight states, and laws designed to keep guns out of the hands of domestic abusers in nine states.¹⁷¹

Other states have moved in the opposite direction, loosening or repealing their gun control laws, however. This underscores the need for a comprehensive federal solution. Five states – Maine,¹⁷² Mississippi,¹⁷³

165. See GUN LAW TRENDWATCH, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (Feb. 2019), <https://lawcenter.giffords.org/wp-content/uploads/2019/02/Giffords-Law-Center-Gun-Law-Trendwatch-2.19.19.pdf>.

166. *Assault Weapons*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#state> (last visited June 18, 2019); *High Capacity Magazines*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/#state> (last visited June 18, 2019).

167. California's law requires all gun owners to keep their firearm in a locked container or secured with a locking device if they live with someone prohibited under California state or federal law from owning a firearm. CAL. PENAL CODE § 25135 (West, Westlaw through Ch. 13 of 2018 Reg. Sess.).

168. Connecticut's safe storage law applies only to *loaded* firearms. CONN. GEN. STAT. ANN. § 29-37i (West, Westlaw through enactments of Pub. Acts enrolled and approved by the Governor on or before June 6, 2018 and effective on or before June 6, 2018).

169. New York's law requires gun owners to keep their firearm locked if they live with a convicted felon, domestic abuser, or a person with a federally prohibitive mental health history. N.Y. PENAL LAW § 265.45 (McKinney, Westlaw through L.2018, Chs. 1 to 72).

170. Massachusetts has had a requirement for some time that *all* firearms be stored with a locking device when they are not in use or when the firearm is not carried "by or under the control of the owner or other lawfully authorized user." MASS. GEN. LAWS ANN. ch. 140, § 131L (West, Westlaw through Chapter 108 of the 2018 2nd Ann. Sess.). The Massachusetts Supreme Judicial Court upheld the law's constitutionality in 2010. *Commonwealth v. Runyan*, 922 N.E.2d 794 (Mass. 2010).

171. *Pressure Leads to Progress*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, giffords.org/pressure-leads-to-progress/ (last visited Apr. 15, 2019).

172. ME. REV. STAT. ANN. tit. 25, § 2001-A (West, Westlaw through Ch. 317 of the 2017 Second Reg. Sess. of the 128th Leg.).

173. MISS. CODE ANN. § 45-9-101(24) (West, Westlaw through the 2018 Reg. Sess. effective through June 29, 2018).

Missouri,¹⁷⁴ North Dakota,¹⁷⁵ and West Virginia¹⁷⁶ – have adopted new laws in the last three years allowing gun owners to carry loaded firearms in public without a permit or training. This brings the total number of states that allow the unrestricted, permit-less concealed carry of loaded firearms in public spaces to twelve.¹⁷⁷ Likewise, in 2013, Kansas revised its laws to allow carrying of concealed guns in any public area of state and municipal buildings, including at public universities,¹⁷⁸ a move similar to the bills signed by governors in Arkansas,¹⁷⁹ Georgia,¹⁸⁰ Idaho,¹⁸¹ and Texas¹⁸² that allowed concealed carry license holders to bring guns onto college campuses. Eight states even have laws which either expressly allow the concealed carry of firearms into K-12 schools or have no law prohibiting it.¹⁸³

The inconsistency between state and local laws on gun ownership exposes people in the United States to increased chances of gun violence.¹⁸⁴ The efforts that one state or city makes to reduce gun violence through legislative measures are easily circumvented if an individual can cross state lines to a location with less restrictive laws.¹⁸⁵ Permissive state

174. MO. ANN. STAT. § 571.030 (West, Westlaw through the 2017 First Reg. Sess. and First and Second Extraordinary Sess. of the 99th Gen. Assemb.).

175. N.D. CENT. CODE ANN. § 62.1-04-02 (West, Westlaw through the 2017 Reg. Sess. of the 65th Legis. Assemb.).

176. W. VA. CODE ANN. § 61-7-7(c) (West, Westlaw through the 2018 Reg. Sess.).

177. See *Concealed Carry*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/ (last visited Feb. 18, 2019).

178. KAN. STAT. ANN. § 75-7c20 (West, Westlaw through the 2018 Reg. Sess. of the Kan. Leg. effective on or before May 17, 2018).

179. ARK. CODE ANN. § 5-73-322 (West, Westlaw through the 2018 Fiscal Sess. and the 2nd Extraordinary Sess. of the 91st Arkansas Gen. Assemb. that are effective June 14).

180. GA. CODE ANN. § 16-11-127.1(c)(20) (West, Westlaw through Acts 281 to 284, 287 to 288, and 290 to 292, 294, 309, 339, 345, 346, 352, 372, 373, 381, 387, 389, 409, 423, 439, 442, 443, 445, 447, 454, 459, 461, 462, 472, 476, 481, 492, 546, 550, 562 of the 2018 Legis. Sess.).

181. IDAHO CODE ANN. § 18-3309 (West, Westlaw through all immediately effective legis. of the Second Reg. Sess. of the 64th Leg.).

182. TEX. GOV'T CODE ANN. § 411.2031 (West, Westlaw through the 2017 Regular and First Called Sess. of the 85th Legislature).

183. *Guns in School*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/ (last visited Feb. 18, 2019).

184. See generally Tessa Collins et al., *State Firearm Laws and Interstate Transfer of Guns in the USA, 2006-2016*, 95 J. URB. HEALTH 332 (2018).

185. For example, Chicago has significantly tightened its gun laws in response to high rates of gun violence and crime, but nearly 60% of guns recovered in the city that were used or suspected of being

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gun laws are of particular concern as a new “Concealed Carry Reciprocity Act”¹⁸⁶ is currently pending in the United States Senate. This legislation, which passed the U.S. House of Representatives on December 6, 2017, requires concealed carry permits issued in one state to be honored by all fifty states.

III. GUN CONTROL LAWS CAN PREVENT GUN VIOLENCE

The United States is a global outlier in gun-related deaths. Rates of gun deaths (both homicide and suicide) are substantially greater compared to other industrialized nations in the Organization for Economic Cooperation and Development (OECD).¹⁸⁷ Based on data from 2015, the United States has, per 100,000 persons, nearly twelve times as many gun deaths as Australia, eleven times as many as Germany, eight times as many as Israel, and twenty times as many as Spain.¹⁸⁸

Yet we know from the experience of other countries, and the variety of experiences in the fifty states, that gun control laws are effective in reducing gun violence. A number of countries have implemented strict gun control laws in response to mass shootings and public safety concerns and have seen significant reductions in gun violence.¹⁸⁹ For example, the Australian government adopted the National Firearms Agreement

used in a crime can be traced to out-of-state gun dealers. Shelby Bremer, *Majority of Guns Used in Chicago Crimes Come From Outside Illinois: Report*, NBC NEWS (Oct. 30, 2017, 7:02 PM), www.nbcchicago.com/blogs/ward-room/chicago-gun-trace-report-2017-454016983.html.

186. Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. (1st Sess. 2017).

187. Philip Alpers et al., *Guns in the United States: Rate of Gun Suicide per 100,000 People*, SYDNEY SCH. OF PUB. HEALTH: GUNPOLICY.ORG, www.gunpolicy.org/firearms/compare/194/rate_of_gun_suicide/66 (last visited Feb. 22, 2019).

188. Based on data from SYDNEY SCH. OF PUB. HEALTH: GUNPOLICY.ORG, www.gunpolicy.org.

189. See generally REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS (Daniel W. Webster & Jon S. Vernick eds., 2013). See Julian Santaella-Tenorio et al., *What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?*, 38 EPIDEMIOLOGIC REVIEWS 140 (2016) (“Evidence from 130 studies in 10 countries suggests that in certain nations the simultaneous implementation of laws targeting multiple firearms restrictions is associated with reductions in firearm deaths.” at 140). Although we cannot see the results yet, New Zealand banned semi-automatic firearms immediately after a horrific mass shooting at two mosques in March 2018. See *It Took New Zealand 26 Days to Act on Gun Control. Congress Has Been Stalling for Years*, WASH. POST (Apr. 10, 2019), www.washingtonpost.com/opinions/it-took-new-zealand-26-days-to-act-on-gun-control-congress-has-been-stalling-for-years/2019/04/10/d553e33e-5bc8-11e9-9625-01d48d50ef75_story.html.

(NFA)¹⁹⁰ in 1996 following the Port Arthur massacre.¹⁹¹ Prior to 1996, each state in Australia had its own gun control laws, which varied widely,¹⁹² like the current situation in the United States. Following the implementation of the NFA, the risk of gun death in Australia fell more than 50% and no mass shootings occurred for twenty years.¹⁹³ It is estimated that the national stock of firearms in Australia was reduced by one-third,¹⁹⁴ and Australia's rate of gun homicide is twenty-three times lower than that of the United States.¹⁹⁵

Likewise, following the 1996 Dunblane shooting,¹⁹⁶ the United Kingdom revised its firearm laws and banned all handguns.¹⁹⁷ British law previously permitted private ownership of guns under certain circumstances¹⁹⁸ and although handgun and rifle owners were required to hold a "firearm certificate," only 1% of applications were refused and they were rarely revoked.¹⁹⁹ Sporting rifles and shotguns remain legal in the United Kingdom, but are subject to strict licensing requirements. Since the

190. This included uniform basic license requirements and the requirement to obtain separate permits for the acquisition of firearms, tight controls on semi-automatic and fully automatic weapons, a gun buy-back provision, universal firearm registration and the creation of a national firearm registry, secure storage regulations, and the implementation of a 28-day waiting period for firearm sales. See Rebecca Peters, *Rational Firearm Regulations: Evidence-Based Gun Laws in Australia*, in REDUCING GUN VIOLENCE IN AMERICA, *supra* note 189, at 196-201; Michael J. Dudley et al., *The Port Arthur Massacre and the National Firearms Agreement: 20 Years On, What are the Lessons?*, 204 MED. J. AUSTL. 381, 381-383 (June 6, 2016).

191. In April 1996, a young man with assault weapons killed 35 people and injured 19 at the Port Arthur historic site in Tasmania, Australia.

192. See Philip Alpers & Zareh Ghazarian, *From Policy Inertia to World Leader: Australia's 'Perfect Storm' of Gun Control*, in SUCCESSFUL PUBLIC POLICY: LESSONS FROM AUSTRALIA AND NEW ZEALAND (Joannah Luetjens, Michael Mintrom & Paul 't Hart eds., forthcoming 2019).

193. Philip Alpers, *Australian Gun Laws*, in THE PALGRAVE HANDBOOK OF AUSTRALIAN AND NEW ZEALAND CRIMINOLOGY, CRIME AND JUSTICE, 787 (Antje Deckert & Rick Sarre eds., 2017).

194. *Id.*

195. Philip Alpers et al., *Guns in Australia: Rate of Gun Homicide per 100,000 People*, SYDNEY SCH. PUB. HEALTH: GUNPOLICY.ORG, www.gunpolicy.org/firearms/compare/10/rate_of_gun_homicide/ (last visited Mar. 31, 2019).

196. In March 1996, a man walked into Dunblane Primary School in Scotland carrying two semi-automatic pistols and two revolvers. He killed one teacher and sixteen five- to six-years-olds and injured ten more children and three teachers.

197. Firearms (Amendment) Act 1997, c. 5, (Eng.); Firearms (Amendment) (No. 2) Act 1997, c. 64, (Eng.).

198. Firearms Act 1968, c. 27, (Eng.).

199. See Michael J. North, *Gun Control in Great Britain after the Dunblane Shootings*, in REDUCING GUN VIOLENCE IN AMERICA, *supra* note 189, at 185, 186.

implementation of the new laws, only one mass shooting has occurred in the United Kingdom and gun violence has continuously decreased.²⁰⁰ England and Wales now have about 4.6 civilian guns per 100 people, compared to more than 120 per 100 people in the United States.²⁰¹ In 2015, there were eleven firearm homicides in the United Kingdom, *one-eighth* as many as in 1996,²⁰² compared to 12,974 firearm homicides in the United States.²⁰³

While Switzerland and Israel are often cited as countries that have low rates of gun violence despite having permissive gun control laws,²⁰⁴ this is misleading. Both Switzerland and Israel have stricter gun control laws and lower civilian gun ownership rates than the United States, as well as much lower rates of gun-related deaths and injuries.²⁰⁵ In Israel, the licensing of firearms is strictly controlled by the State – about 40% of applicants are denied²⁰⁶ – and the government not only limits what type and how many guns can be owned by a license holder – one – but closely tracks firearm and ammunition possession and sales. Applicants for gun licenses must be at least twenty-seven-years-old, have no criminal background or arrests for domestic violence or drug use, and must renew their license at least every three years.²⁰⁷ Swiss federal law requires acquisition licenses, valid for a

200. *Id.* at 192.

201. Aaron Karp, *Estimating Global Civilian-held Firearm Numbers – Annex: 2017 Civilian Firearms Holdings Data by Country/Territory*, SMALL ARMS SURVEY (2018), www.smallarmssurvey.org/fileadmin/docs/Weapons_and_Markets/Tools/Firearms_holdings/SAS-BP-Civilian-held-firearms-annexe.pdf

202. *United Kingdom – Gun Facts, Figures and the Law*, SYDNEY SCH. OF PUB. HEALTH: GUNPOLICY.ORG, www.gunpolicy.org/firearms/region/united-kingdom (last accessed May 15, 2019).

203. *United States – Gun Facts, Figures and the Law*, SYDNEY SCH. OF PUB. HEALTH: GUNPOLICY.ORG, www.gunpolicy.org/firearms/region/united-states (last accessed May 15, 2019).

204. *See, e.g.*, David Lampo, Commentary, *Gun Control: Myths and Realities*, CATO INST. (May 13, 2000), www.cato.org/publications/commentary/gun-control-myths-realities.

205. *See generally* Janet E. Rosenbaum, *Gun Utopias? Firearm Access and Ownership in Israel and Switzerland*, 33 J. PUB. HEALTH POL'Y 46 (2012).

206. In contrast, in the United States, approximately 25.6 million background checks were conducted for firearm purchases in 2017; only 181,000 – 0.7% – were rejected. *See* U.S. GOV'T ACCOUNTABILITY OFF., *FEW INDIVIDUALS DENIED FIREARMS PURCHASES ARE PROSECUTED AND ATF SHOULD ASSESS USE OF WARNING NOTICES IN LIEU OF PROSECUTIONS* (2018), www.gao.gov/assets/700/694290.pdf.

207. *See* Rosenbaum, *supra* note 205; Haviv Rettig Gur, *Comparing America to Israel on Gun Laws is Dishonest – and Revealing*, TIMES OF ISR. (Mar. 1, 2018), www.timesofisrael.com/comparing-america-to-israel-on-gun-laws-is-dishonest-and-revealing/. *See also* *Firearms-Control Legislation and Policy: Israel*, LIBRARY OF CONGRESS (last updated July 30, 2015).

maximum of nine months and one weapon, for the purchase of all handguns. Those who wish to own a gun for “defensive purposes” must acquire an additional carrying-license, which requires the applicant to show an existing threat and pass an exam testing their knowledge and skill. Switzerland has not had a mass shooting since 2001.²⁰⁸

Japan has some of the strictest gun control laws in the world – allowing only shotguns for hunting or sport and imposing a strict licensing process and storage requirements²⁰⁹ – and the rate of both gun violence and gun possession in Japan is close to zero.²¹⁰ The association between enacting stricter gun control laws and reducing violence can also be seen in Brazil,²¹¹ Austria,²¹² New Zealand,²¹³ and South Africa.²¹⁴

These patterns are reflected in the United States, as well. One of the most significant factors influencing a state’s rate of gun violence is the strength of its gun control laws. Research consistently demonstrates that states with more robust gun control legislation have fewer gun-related deaths.²¹⁵ A 2016 study found that the ten states with the weakest gun laws

208. See Rosenbaum, *supra* note 205; Hilary Brueck, *Switzerland Has a Stunningly High Rate of Gun Ownership — Here’s Why it Doesn’t Have Mass Shootings*, BUS. INSIDER (Mar. 24, 2018), www.businessinsider.com/switzerland-gun-laws-rates-of-gun-deaths-2018-2. See also *Firearms-Control Legislation and Policy: Switzerland*, LIBRARY OF CONGRESS (last updated July 30, 2015).

209. See David B. Kopel, *Japanese Gun Control*, 2 ASIA PAC. L. REV. 26, 26-27 (1993). Licensing requires a class, skills, knowledge, safety, and mental health tests, and extensive background checks. Police have unlimited discretion to deny licenses to any person for whom “there is reasonable cause to suspect may be dangerous to other persons’ lives or properties or to the public peace.” *Id.* at 27.

210. See Karp, 2018 Small Arms Survey, *supra* note 59 (the rate of private gun ownership in Japan in 2017 was estimated as 0.30 per 100 people); *Inter-country Comparison of Mortality for Selected Causes of Death*, WHO Mortality Data Base, WORLD HEALTH ORGANIZATION (Dec. 2016) (the rate of all gun deaths in Japan in 2014 was 0.02 per 100,000 people, or 28 people total). See also *Japan – Gun Facts, Figures and the Law*, SYDNEY SCH. OF PUB. HEALTH: GUNPOLICY.ORG, www.gunpolicy.org/firearms/region/japan (last visited Jan. 31, 2019).

211. See Antonio Rangel Banderia, *Brazil: Gun Control and Homicide Reduction*, in REDUCING GUN VIOLENCE IN AMERICA, *supra* note 189, 213.

212. See Nestor D. Kapusta et al., *Firearm Legislation Reform in the European Union: Impact on Firearm Availability, Firearm Suicide and Homicide Rates in Austria*, 191 BRITISH J. PSYCH. 253 (2007).

213. See Annette L. Beautrais et al., *Firearms Legislation and Reductions in Firearm-Related Suicide Deaths in New Zealand*, 40 AUS. & N.Z. J. PSYCH. 253 (2006).

214. See Richard G. Matzopoulos et al., *Firearm and Nonfirearm Homicide in 5 South African Cities: A Retrospective Population-based Study*, 104 AM. J. PUB. HEALTH 455 (2014).

215. See generally RAND CORPORATION, *THE SCIENCE OF GUN POLICY* (2018), www.rand.org/pubs/research_reports/RR2088.html. See John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level*

had rates of gun violence that were collectively 3.2 times higher than the ten states with the strongest gun laws.²¹⁶ Likewise, gun ownership and gun prevalence rates across states are positively correlated with rates of firearm homicide and suicide.²¹⁷ One study found that the nine states with the lowest rates of gun prevalence also ranked lowest for suicide rates, whereas the three states with the highest rates of gun prevalence were also among the four states with the highest suicide rates.²¹⁸ While the NRA has argued vociferously that “the only way to stop a bad guy with a gun is a good guy with a gun,”²¹⁹ researchers have demonstrated this slogan to be

Synthetic Controls Analysis 3 (Nat'l Bureau Of Econ. Research, Working Paper No. 23510, 2018); Eric W. Fleegler et al., *Firearm Legislation and Firearm-Related Fatalities in the United States*, 173 [J]AMA INTERNAL MED. 732, 734 (2013); Richard Florida, *The Geography of Gun Deaths*, THE ATLANTIC (Jan. 13, 2011), www.theatlantic.com/national/archive/2011/01/the-geography-of-gun-deaths/69354/; Ik-Whan G. Kwon & Daniel W. Baack, *The Effectiveness of Legislation Controlling Gun Usage: A Holistic Measure of Gun Control Legislation*, 64 AM. J. ECON. SOC. 533 (2005); Steven P. Lanza, *The Effect of Firearm Restrictions on Gun-Related Homicides Across US States*, 21 APPLIED ECON. LETTERS 902 (2014); Colin Loftin et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 1615, 1620 (1991); David McDowall et al., *Using Quasi-Experiments to Evaluate Firearm Laws: Comment on Britt et al.'s Reassessment of the D.C. Gun Law*, 30 L. & SOC. R. 381 (1996).

216. CHELSEA PARSONS & EUGENIO WEIGEND, CTR. FOR AM. PROGRESS, *AMERICA UNDER FIRE 3* (2016), cdn.americanprogress.org/wp-content/uploads/2016/10/11100940/AmericaUnderFire-report.pdf.

217. Justin Thomas Briggs & Alexander Tabarrok, *Firearms and Suicides in US States*, 37 INT'L REV. OF LAW & ECON. 180 (2014); Matthew Miller et al., *Firearms and Suicide in the United States: is Risk Independent of Underlying Suicidal Behavior?*, 178 AM. J. EPIDEMIOLOGY 946, 951 (2013); Matthew Miller & David Hemenway, *Guns and Suicide in the United States*, 359 N. ENG. J. MED. 672 (2008); Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA 1029, 1029 (2007); Matthew Miller et al., *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 SOC. SCI. MED. 656 (2007); Riddell et al. *supra* note 28, at 717; Michael Siegel et al., *The Relationship between Gun Ownership and Firearm Homicide Rates in the United States, 1981-2011*, 103 AM. J. PUB. HEALTH 2098, 2102 (2013). *See also* Hepburn & Hemenway, *supra* note 61 (a review of the literature finding that gun availability is a risk factor for increased homicide rates across the United States and across high-income nations).

218. *Gun Prevalence and Suicide Rank by State*, HARV. SCH. PUB. HEALTH MAGAZINE (Spring 2008), www.hsph.harvard.edu/news/magazine/spr08gunprevalence/.

219. *See, e.g.*, Peter Overby, *NRA: 'Only Thing That Stops A Bad Guy With A Gun Is A Good Guy With A Gun'*, NPR (Dec. 21, 2012), www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun (quoting NRA executive vice president Wayne LaPierre making this claim a week after the Sandy Hook shooting); Lauren Fox, *NRA chief accuses Democrats of pushing 'socialist' agenda in wake of Florida shooting*, CNN (Feb. 23, 2018), www.cnn.com/2018/02/22/politics/wayne-lapierre-cpac-speech-nra/index.html (LaPierre repeating this claim following the Parkland shooting).

demonstrably incorrect,²²⁰ and the research studies cited to support it have been largely debunked.²²¹ In fact, as Philip Alpers argues in this volume, for public health practitioners “the gun is to gun violence as the mosquito is to malaria.”²²² Break the chain of causation, Alpers writes, and the disease begins to retreat.²²³

IV. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS OF THE UNITED STATES

A. The Legal Framework: Americans Have Human Rights Too

The United States is bound by its international treaty obligations and customary international law.²²⁴ While a comprehensive treatment of this subject is beyond the scope of this Article, a brief introduction to the subject, relevant to a human rights analysis of the U.S. gun violence crisis, follows. The United States has ratified or signed a variety of human rights instruments imposing a duty to protect individuals in its territories and to prevent the harm associated with firearm violence. These include the Charter of the United Nations, the Universal Declaration of Human

220. To the contrary, research shows that more guns equate with more gun violence. This holds true both in the United States and in other high-income countries. *See supra* note 217 and works cited.

221. For example, the NRA often relies upon a more than two-decade-old study which argued that more concealed weapons led to a decrease in crime rates. *See* John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 41 (1996). However, many experts in the field consider this study to have been debunked. *See, e.g.*, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2004) (discrediting the theory that Right-to-Carry laws reduce crime); Donohue, *supra* note 215 (estimating that violent crime rates in states which enacted right-to-carry concealed handgun laws were 13-15% higher over ten years than if the state had not adopted the law); Dan Black & Daniel Nagin, *Do Right-to-Carry Laws Deter Violent Crime?*, 27 J. LEGAL STUDIES 209, 209 (1998) (“our reanalysis of Lott and Mustard’s data provides no basis for drawing confident conclusions about the impact of right-to-carry laws on violent crime”); Albert Alschuler, *Two Guns, Four Guns, Six Guns, More Guns: Does Arming the Public Reduce Crime*, 31 VALPARAISO UNIV. L. REV. 1 (1997); Franklin Zimring & Gordon Hawkins, *Concealed Handguns: The Counterfeit Debate*, THE RESPONSIVE COMMUNITY (Spring 1997).

222. Philip Alpers, *America Already Led, Test, and Proved Many of the Solutions: One Day They Are Inevitable*, 60 WASH. U. J.L. & POL’Y 259, 261 (2019).

223. *Id.*

224. *See generally* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (2d ed., 2003).

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Rights,²²⁵ the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man,²²⁶ the International Covenant on the Elimination of All Forms of Racial Discrimination,²²⁷ the International Covenant on Civil and Political Rights,²²⁸ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,²²⁹ the Convention on the Elimination on all Forms of Discrimination Against Women,²³⁰ the Convention on the Rights of the Child,²³¹ the International Covenant on Economic, Social and Cultural Rights,²³² and the Constitution of the World Health Organization.²³³

Treaties signed by the President and ratified by the Senate are the “supreme law of the land.”²³⁴ The United States is required to comply with and implement the provisions of these treaties just as it would any other federal law, subject to any lawful reservations, understandings, and declarations (RUDs) entered at ratification. The U.S. Senate frequently attaches RUDs to its ratification of human rights treaties. These generally include a non-self-executing clause and an understanding related to the

225. Universal Declaration of Human Rights, GA res. 217A (III), U.N. Doc A/810 at 71 (1948) [hereinafter UDHR].

226. As the Commission noted in *Saldaño v. United States*, the United States has been a member of the OAS since June 19, 1951, the date upon which it deposited its instrument of ratification of the Organization of American States (OAS) Charter. For this reason, it is required to respect and guarantee the rights protected in the OAS Charter and the American Declaration of the Rights and Duties of Man (American Declaration). *Saldaño v. United States*, Case 12.254, Inter-Am. Comm’n H.R., Report No. 24/17, OEA/Ser.L/V/161, doc. 31 rev. ¶ 76 (2017).

227. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter ICERD].

228. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

229. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

230. G.A. Res. 34/180, Convention on the Elimination of all Forms of Discrimination Against Women, at 193 (Dec. 18, 1979) [hereinafter CEDAW].

231. Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990 [hereinafter CRC]. This treaty is universally ratified by every eligible country in the world aside from the United States.

232. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter ICESCR].

233. Constitution of the World Health Organization, Jul. 22, 1946, 14 U.N.T.S. 185 (entered into force Apr. 7, 1948) [hereinafter WHO Constitution].

234. U.S. CONST. art. VI., cl. 2.

country's federal system.²³⁵ Although the U.S. government has clarified that these RUDs “in no way lessen[] the obligation of the United States to comply with [the treaty] . . . as a matter of international law,”²³⁶ the non-self-executing declarations have been understood to prevent the treaties from creating private rights of action in U.S. courts without the adoption of implementing legislation by Congress.²³⁷ Scholars and human rights bodies have criticized non-self-executing declarations²³⁸ as inconsistent with the object and purpose of the international treaties they are attached to because they render their direct enforcement very difficult.²³⁹

Federal-state understandings, such as the provision the Senate attached to its ratification of the International Convention on the Elimination of Racial Discrimination which provides, in part, that “the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments,”²⁴⁰ are also problematic. Under international law, the United States cannot rely upon its federal structure as an excuse for non-performance. This rule is expressed in articles 26 and 27 of the Vienna Convention on the Law of Treaties, providing that once a State has ratified a treaty, international law imposes a duty on it to carry out its treaty obligations in good faith and it

235. See generally Louis Henkin, *Editorial Comments - U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). See also David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999).

236. United States of America, Initial Report to the Committee on the Elimination of Racial Discrimination, 41 (Sept. 2000) [hereinafter 2000 USA Report to CERD] (regarding the non-self-executing declaration).

237. See S. Exec. Rep. No. 102-23 (1992), reprinted in 31 I.L.M. 645, 658-659 (clarifying that this was the purpose of Congress's non-self-executing declaration that was attached to its ratification of the ICCPR).

238. See, e.g., M. Cherif Bassiouni, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 DEPAUL L. REV. 1169, 1179 (1993); Henkin, *The Ghost of Senator Bricker*, *supra* note 235; Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1484 & n. 17 (2003). See also Eric Chung, *The Judicial Enforceability and Legal Effects of Treaty Reservations, Understandings, and Declarations*, 126 YALE L. J. 170 (2016).

239. See also Human Rights Comm., General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

240. U.S. reservations, declarations, and understandings, Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

cannot invoke difficulties presented by its internal law to justify its non-performance.²⁴¹ The U.S. government has acknowledged this.²⁴²

In addition to treaties, customary international law norms²⁴³ create obligations of the U.S. government towards individuals living in the United States. The United States voted in favor of the Universal Declaration of Human Rights in 1948 and played a primary role in its drafting under the leadership of Eleanor Roosevelt.²⁴⁴ Many, if not all, of the provisions of this foundational human rights document are now considered to be part and parcel of customary international law.²⁴⁵ The

241. Vienna Convention on the Law of Treaties arts. 26 & 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]. *See also* Henkin, *The Ghost of Senator Bricker*, *supra* note 235, at 346.

242. *See, e.g.*, 2000 USA Report to CERD, *supra* note 236, at 40 (“this understanding . . . does not condition or limit the international obligations of the United States. Nor can it serve as an excuse for any failure to comply with those obligations as a matter of domestic or international law.”); *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 41 (1990) (statement of Hon. Abraham D. Sofaer, Legal Adviser, Department of State) (“it [the federal-state understanding] is saying to the world we have a constitutional system, and . . . we are going to abide by our constitutional system of federalism . . . We are still obliged to implement [the Convention] . . .”).

243. Consistent with normal methodologies, this Article surveys numerous instruments accepted as providing evidence of the existence of rules of customary law, including widely ratified international treaties, U.N. General Assembly declarations, *see* Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, ¶ 70 (July 8), and regional human rights instruments, *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702, n.2 (1987) [hereinafter RESTATEMENT] (listing the adoption of human rights principles in regional organizations as contributing to customary human rights law), including the African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982) [hereinafter Banjul Charter]; the Arab Charter on Human Rights, Stat. 1031; TS 993; 3 Bevens 1153; the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221 [hereinafter European Convention on Human Rights]; the American Convention on Human Rights, 1144 UNTS 123; 9 ILM 99 (1969); the Charter of Fundamental Rights of the European Union, European Union, Oct. 26, 2012, 2012/C 326/02; the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003) [hereinafter American Declaration]; the Charter of the Organisation of American States, Apr. 30, 1948 [hereinafter OAS Charter]; and the Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, Nov. 18, 2012.

244. *See generally* MARY ANN GLENDON, *A NEW WORLD MADE CLEAR: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001); JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGIN, DRAFTING AND INTENT* (1999).

245. *See generally* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (1995-96). *See* Karima Bennoune, Report of the Special Rapporteur in the Field of Cultural Rights, ¶ 17, U.N. Doc. A/73/227 (July 25, 2018) (“Today the Universal Declaration of Human Rights is understood by many to be a statement of customary international law. . . .”); Elizabeth F. Defeis, *Universal Declaration of Human Rights: A*

United States has also signed many human rights treaties that are widely ratified, many provisions of which are considered to be part of customary international law. These include the Convention on the Elimination on all Forms of Discrimination Against Women, which has 189 States Parties, the Convention on the Rights of the Child, which has 196 States Parties, and the International Covenant on Economic, Social and Cultural Rights, which has 169 States Parties.

The U.S. Supreme Court has consistently held that “[i]nternational law is part of our law”²⁴⁶ and the United States, like all nations, is bound by customary international law.²⁴⁷ In one of the most famous restatements of this principle, Justice Gray, writing for the Court in the *Paquete Habana*, explained that in the absence of treaties, “resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the

Standard for States, 28 SETON HALL LEGIS. J. 259, 264 (2004) (“many of [the UDHR’s] articles have been accepted as customary international law and binding on all nations”); Philip Alston, *The Universal Declaration at 35: Western and Passé or Alive and Universal*, 31 I.C.J. REV. 60 (1982) (finding a “large and growing body of evidence” that at least the first twenty-one articles were part of customary law); JOHN P. HUMPHREY, NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS 155 (1989) (noting the Declaration’s “binding character as part of the customary law of nations”); Galindo Pohl, Special Representative of the UN Commission on Human Rights, Report on the Situation of Human Rights in Iran, U.N. Doc. E/CN.4/1987/23, at 4-5 (1987) (“[t]he rights and freedoms set out in the Universal Declaration have become international customary law through State practice and *opinion juris*”); PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 233-37 (1993); Resolution adopted by the International Law Association, *reprinted in* International Law Association, Report of the Sixty-Sixth Conference, Buenos Aires (1994), at 29. *See also* LOUIS HENKIN, THE AGE OF RIGHTS 19 (1990).

246. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900).

247. *See, e.g.*, *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 299 n.* (C.C.D. Pa. 1793) (the “law of nations is part of the law of the United States.”); *Hilton v. Guyot*, 159 U.S. 113 (1895) (“International law in its widest and most comprehensive sense . . . is part of our law”). *See generally* Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 30 MICH. J. INT’L L. 301 (1999) (“[t]he Founders clearly expected that the customary law of nations was binding, was supreme law, created . . . private rights and duties, and would be applicable in the United States Federal courts.” *Id.* at 301. “[I]n the 20th Century, there are cases allowing customary international law to prevail over Executive acts . . . and congressional legislation.” *Id.* at 317 (internal citations omitted). *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 234, 510 n.20 (2d. 1996) (“Framers expected federal courts to enforce state observance of the law of nations.”); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); RESTATEMENT, *supra* note 243, § 111; Paust, INTERNATIONAL LAW AS LAW OF THE UNITED STATES, *supra* note 224, at 7, 44-48, 53-57; Judge Edward D. Re., *Human Rights, International Law and Domestic Courts*, 70 ST. JOHN’S L. REV. 51 (1996).

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subjects of which they treat.”²⁴⁸

Some of the international human rights obligations that the United States must respect also have the status of *jus cogens*. This means that these rights are non-derogable and cannot be suspended even during exceptional circumstances such as a state of emergency.²⁴⁹ Gun violence impacts several *jus cogens* norms, including the right to life and the prohibition of ill-treatment. These norms are found in both customary international law²⁵⁰ and in treaties.²⁵¹

Several international human rights bodies can and do evaluate the compliance of the United States with international human rights law (just as they evaluate other countries, as well).²⁵² These include the U.N. Human Rights Council, which is a subsidiary body of the General Assembly and can monitor human rights performances of all States.²⁵³ They also include the Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, the Committee on the Elimination of Racial Discrimination, which monitors compliance with the International Convention on the Elimination of all Forms of Racial Discrimination, the Committee against Torture,

248. *The Paquete Habana*, 175 U.S. at 700.

249. VCLT, *supra* note 241, art. 53. See Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW* 78, 97-98 (Donald Earl Childress III ed., 2012). See ANTONIO CASSESE, *INTERNATIONAL LAW* 198-212 (2d ed., 2004).

250. See *Domingues v. United States*, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, doc. 5 rev.1 at 913, ¶ 85 (2002) (finding that a *jus cogens* norm can be non-derogable, even if a State has not signed a treaty explicitly protecting such a norm). See also Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 *HASTINGS INT’L & COMP. L. REV.* 411 (1988-1989); *RESTATEMENT*, *supra* note 243, § 702; International Law Association, *Minimum Standards of Human Rights Norms in a State of Exception*, Report of the Sixty-first Conference Held at Paris, August 26th to September 1st 1984 (1985) at 70.

251. ICCPR, *supra* note 228, art. 4(2). Furthermore, “[t]he fact that some of the provisions of the Covenant have been listed in article 4 (para. 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists.” Human Rights Comm., General Comment No. 29: Article 4: Derogations During a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

252. See generally Engaging International and Regional Mechanism for Domestic Advocacy, in *HUMAN RIGHTS ADVOCACY IN THE UNITED STATES*, 495-628 (MARTHA F. DAVIS, JOHANNA KALB & RISA E. KAUFMAN, EDs., 2014).

253. The Council can evaluate the performance of the United States, even though the United States withdrew from the Council in June 2018. Gardiner Harris, *Trump Administration Withdraws U.S. From U.N. Human Rights Council*, *N.Y. TIMES* (June 19, 2018), www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html.

which monitors compliance with the Convention against Torture, and the Inter-American Commission on Human Rights. The Special Rapporteur on Women, who reports to the Human Rights Council, is also empowered to review the human rights practices of the United States as they related to the protection of women. Many of these bodies have commented on the human rights implications of U.S. gun violence,²⁵⁴ as noted below in Part VI.A.

B. The Affirmative Obligation to Prevent and Protect

In the United States, rights are generally defined in the negative, as limits upon the government's authority to take certain actions.²⁵⁵ The First Amendment, for example, states that "Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise

254. See, e.g., Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Comments of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/79/Add.50, ¶ 17 (Apr. 7, 1995) [hereinafter Human Rights Comm., Concluding Observations 1995]; Human Rights Comm., Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, ¶ 10 (Apr. 23, 2014) [hereinafter Human Rights Comm., Concluding Observations 2014]; Committee on the Elimination of Racial Discrimination, Concluding observations on the combined seventh to ninth periodic reports of the United States of America, U.N. Doc. CERD/C/USA/CO/7-9, ¶ 16 (Sept. 25, 2014) [hereinafter CERD, Concluding Observations 2014]; Human Rights Council, Working Group on the Universal Periodic Review, Compilation prepared by the OHCHR – United States of America, U.N. Doc. A/HRC/WG.6/22/USA/2, ¶ 21 (Mar. 2, 2015); Human Rights Council, Report of the Working Group on the Universal Periodic Review, United States of America, U.N. Doc. A/HRC/30/12, at 27-28 (July 20, 2015); Human Rights Council, Report of the Special Rapporteur on violence against Women, its causes and consequences, Ms. Rashida Manjoo, U.N. Doc. A/HRC/17/26/Add.5, ¶ 115.A(g) (June 6, 2011); Press Release No. 076/16, Organization of American States, *IACHR Condemns Mass Shooting at a Gay Bar in the United States* (June 14, 2016), www.oas.org/en/iachr/media_center/preleases/2016/076.asp; Press Release No. 154/17, *IACHR Condemns Mass Shooting in the United States* (Oct. 6, 2017), www.oas.org/en/iachr/media_center/PReleases/2017/154.asp; Press Release No. 182/17, Organization of American States, *IACHR Condemns Mass Shooting in United States and Calls on the State to Adopt Measures to Prevent Future Tragedies* (Nov. 16, 2017), www.oas.org/en/iachr/media_center/PReleases/2017/182.asp.

255. See generally David P. Currie, *Positive and Negative Rights*, 53 U. CHI. L. REV. 864, 864-67 (1986). Federal courts have however found that the failure to act can result in a violation of the duty to protect fundamental rights. See *Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943) (noting that the Supreme Court "has already taken the position that culpable official state inaction may also constitute a denial of equal protection."); *Lynch v. United States*, 189F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951) ("...the law now is that culpable official inaction may also constitute a denial of equal protection.").

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”²⁵⁶ Similarly, the Second and Fourth Amendments, respectively, include the language “*shall not* be infringed” and “*shall not* be violated.”²⁵⁷ Although some scholars have challenged this strict positive/negative characterization,²⁵⁸ many scholars and justices believe it to be true.²⁵⁹ These negative rights derive from “a libertarian constitutional tradition that is inherently antithetical to the notion of positive rights.”²⁶⁰

In contrast, international human rights instruments (and a growing number of constitutions around the world)²⁶¹ often impose affirmative obligations on States Parties to act with due diligence.²⁶² The text of human rights treaties is unequivocal: States must “respect,” “ensure,”

256. U.S. CONST. amend. I (emphasis added).

257. U.S. CONST. amend. II, IV (emphasis added).

258. See, e.g., Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. L. REVIEW 750 (2001) (arguing that a strict positive/negative rights distinction is an inappropriate characterization).

259. Judge Posner once wrote, the U.S. Constitution “is a charter of negative rights rather than positive liberties.” *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), cert. denied, 465 U.S. 1049 (1983). See also Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1989-1990).

260. Law & Versteeg, *supra* note 143, at 806-07, citing LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 9 (2d ed. 1991) (for the proposition that the U.S. Constitution is rooted in a Lockean intellectual tradition).

261. For a comprehensive review of the growing constitutional tradition to incorporate increasing numbers of positive rights, the similarities of these constitutions to human rights instruments, and the possible influence of these instruments on the former, see generally Law & Versteeg, *supra* note 143, pp 833-850.

262. For a discussion on the State’s requirement of “due diligence” to prevent human rights violations, see Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 *FORDHAM INT’L L.J.* 1, 21-23 and works cited (1989-90). Shelton states that “[d]ue diligence consists of the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.” *Id.* at 23. To emphasize the appropriate standard, she references U.S. tort law: “the [danger] reasonably to be perceived defines the duty to be obeyed.” *Id.* (citing *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928)). See Stephanie Farrow, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 *AM. SOC’Y INT’L PROC.* 299, 303 (1998) (“In general, due diligence involves concepts of duty and failure to exercise due care, in other words, a negligence analysis, though views differ as to whether knowledge of the risk is required, or just foreseeability. The duty encompasses an obligation to marshal the full apparatus of the state to prevent, investigate, punish and compensate.”). See also Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 *BUFF. HUM. RTS. L. REV.* 21, 83-85 (2005) (discussing how a State determines what measures are “reasonable and appropriate” to protect its population).

“protect,” and “undertake” human rights obligations and “prevent” human rights abuses. When a State does not protect the human rights of its citizens, it falls short of its obligations under international law,²⁶³ and can be held responsible for acts as well as for failing to act (*i.e.* responsibility by omission),²⁶⁴ including failing to legislate.²⁶⁵ Thus, under article 2.2 of the International Covenant on Civil and Political Rights, “each State Party to the present Covenant undertakes to take the necessary steps... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”²⁶⁶ and under article 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination:

States Parties *shall [...] take*, in the social, economic, cultural and other fields, *special and concrete measures* to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.²⁶⁷

Article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination further requires States Parties to “adopt

263. See generally Hessbruegge, *Human Rights Violations*, *supra* note 262, at 70-76. See also Danwood Mzikenge Chirwa, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 MELB. J. INT'L L. 1, 21 (2004).

264. See Roberto Ago, Second Report on State Responsibility, U.N. Doc. A/CN.4/233/1970, in 2 Y.B. INT'L L. COMM'N 177, 188, ¶ 35 (1970) (noting that “the cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on action taken by a State.”) See also Farrior, *supra* note 262 at 301.

265. For example, an early draft for an International Code of State Responsibility for Injury to Aliens stated “International responsibility is incurred by a State if damage is sustained by a foreigner as a result either of the enactment of legislation incompatible with its international obligations or of the non-enactment of legislation necessary for carrying out those obligations.” *Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners*, League of Nations Doc. C.351(c) M. 145(c) 1930 V Annex IV, art. 6, at 236, *quoted in* F.V. GARCIAAMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974). On the duty of legislators to legislate, see generally Robin West, *Rights, Harms, and Duties*, 90 BOSTON U. L. R. 819, 831-34 (2010). See also Roger Paul Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME L. 303 (1958-1959) (discussing the failure to pass legislation in the context of states’ rights and the Fourteenth Amendment).

266. ICCPR, *supra* note 228, art. 2.2.

267. ICERD, *supra* note 227, art. 2.2 (emphasis added). This is also true of treaties the United States has signed, but not ratified. See, e.g., CEDAW, *supra* note 230, art. 3.

immediate and effective measures, particularly in the fields of teaching, education, culture and information” to combat prejudices.²⁶⁸ Likewise, article 2 of the Convention against Torture obligates States Parties to take affirmative measures to prevent torture and ill-treatment, including “effective legislative, administrative, judicial or other measures.”²⁶⁹ The Committee against Torture has found that States Parties are obligated to “eliminate any legal or other obstacles that impede the eradication” of ill-treatment and “take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.”²⁷⁰

In addition to protecting human rights and preventing violations, States can violate their human rights obligations by failing to properly investigate and punish violations. This is based on the idea that impunity and a lack of accountability for the commission of human rights violations may encourage further violations. States must ensure that victims obtain remedy and redress,²⁷¹ including “guarantees of non-repetition.”²⁷² This

268. ICERD, *supra* note 227, art. 7. The Committee on the Elimination of Racial Discrimination calls on States to “eliminate racial discrimination in the enjoyment of [civil, political, economic, social or cultural] human rights” and requires States Parties to protect all the rights and freedoms referred to in ICERD article 5, which includes the right to security of person and protection from the State against violence, political rights, civil rights, including the freedoms of religion, opinion, and assembly, and economic, social, and cultural rights, including to public health, education, and equal participation in cultural activities. *See* Comm. on the Elimination of Racial Discrimination, General Recommendation XX on article 5 of the Convention, U.N. Doc. A/51/18, annex VIII at 124, ¶¶ 2, 5 (1996).

269. UNCAT, *supra* note 229, art. 2. The Committee has said that the measures to prevent torture must also be applied to prevent ill-treatment. Comm. Against Torture [CAT], General Comment No. 2, Implementation of art. 2 by States Parties, ¶¶ 2-3, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

270. CAT, General Comment No. 2, *supra* note 269, ¶ 4.

271. *See generally* M. Cherif Bassiouni, *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final report of the Special Rapporteur, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000); INTERNATIONAL COMMISSION OF JURISTS, THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONERS’ GUIDE (2018), www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf. The right to remedy is found extensively in human rights treaties. ICCPR, *supra* note 228, art. 2(3); ICERD, *supra* note 227, art. 6; CRC, *supra* note 231, art. 39; UNCAT, *supra* note 229, art. 14(1). The Committee against Torture has clarified that article 14 is also applicable to victims of ill-treatment. *See* Hajrizi Dzemajl et al. v. Yugoslavia, Complaint No. 161/2000, Comm. Against Torture, ¶ 9.6, U.N. Doc. CAT/C/29/D/161/2000 (Dec. 2, 2000). The Universal Declaration of Human Rights also provides the right to a remedy for violations of human rights law. UDHR, *supra* note 225, art. 8.

272. General Assembly Resolution A/RES/60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle 18 (2005).

may include “reviewing and reforming laws contributing to or allowing” prohibited conduct²⁷³ or, “[i]f the violation stems from the absence of certain legal provisions, the measures of reparation should include the adoption of the necessary laws or regulations.”²⁷⁴

C. Violations by Private Actors Engage the Responsibility of the State

Under international human rights law, the State is not released from its obligations simply because private actors have caused a particular harm.²⁷⁵ This is made explicit in some treaties²⁷⁶ and has been referenced often by the Inter-American Commission on Human Rights,²⁷⁷ the Human Rights Committee,²⁷⁸ the Committee on the Elimination of Racial Discrimination,²⁷⁹ and the Committee against Torture,²⁸⁰ as well as human

273. Comm. against Torture [CAT], General Comment No. 3, Implementation of art. 14 by States Parties, ¶ 8, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012).

274. Human Rights Comm., Guidelines on measures of reparation under the Optional Protocol to the International Covenant on Civil and Political Rights, ¶ 13(a), U.N. Doc. CCPR/C/158 (Nov. 30, 2016).

275. See generally Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & P. 265 (2004).

276. See, e.g., ICERD, *supra* note 227, art. 5(b) (explicitly stating that States Parties must guarantee the “right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution”). All six general human rights treaties create positive obligations for the State to control some non-State action. This is a consequence of the dual obligations to “respect” human rights (requiring the State to refrain from violating the rights) and to “ensure” rights – which is understood to refer to duties of performance. See Hessbruegge, *Human Rights Violations*, *supra* note 262, at 70-71; Farrior, *supra* note 262, at 301.

277. Jessica Lenahan (Gonzalez) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II, doc. 69 rev., ¶ 128 (2011) (the State has an obligation to “prevent and respond to the actions of non-state actors and private persons”).

278. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (States must protect “not just against violations . . . by its agents, but also against acts committed by private persons or entities”).

279. See, e.g., L.K. v. Netherlands, Communication No. 4/1991, U.N. Doc. CERD/C/42/D/4/1991 (Mar. 16, 1993) (finding the Netherlands responsible for a foreign family being threatened by locals when trying to lease a private apartment and for a failure to properly investigate). See also, e.g., A. YilmazDogan v. Netherlands, Communication No. 1/1984, U.N. Doc. CERD/C/36/D/1/1984 (1987) (finding a violation in the racially discriminatory termination of a private employment contract).

280. See, e.g., Hajrizi Dzemailj et al. v. Yugoslavia, *supra* note 271 (finding Yugoslavia responsible for the destruction of a Romani settlement by a civilian mob when the police were in a position to intervene and did not). See also Comm. against Torture, Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR), ¶ 6, U.N. Doc. CAT/C/51/4 (Dec. 16, 2013) (the obligation to prevent applies in “contexts

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rights courts,²⁸¹ and academic commentary.²⁸² The State becomes responsible for these violations in two ways: (1) the conduct may be attributable to the State because it is carried out by *de jure* or *de facto* agents of the State or those performing public functions; or (2) the State may be responsible for failing to exercise its due diligence obligation to protect against the harm.²⁸³ As the U.N. Human Rights Committee has explained:

There may be circumstances in which a failure to ensure Covenant rights . . . would give rise to violations by States Parties . . . as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.²⁸⁴

As such, although more than 98% of the shootings in the United States are carried out by private actors,²⁸⁵ the U.S. government may be held

where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm”).

281. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988) (“[a]n illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person . . .) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required. . . .”). See, e.g., González et al. (Campo Algodonero) v. Mexico, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 181 (Nov. 16, 2009) (finding that violence against women by private actors violates a State’s obligations to protect under the American Convention); A. v. United Kingdom, Application No. 25599/94, Eur. Ct. H.R. (Sept. 23 1998) (corporal punishment administered by a parent can violate the prohibition against torture and ill-treatment if the State fails to provide adequate protection). See also ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993), p. 89, nn. 3-4.

282. See, e.g., Hessbruegge, *Human Rights Violations*, supra note 262; Chirwa, supra note 263; Farrior, supra note 262; Shelton, supra note 262; ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).

283. See Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, supra note 275; Hessbruegge, *Human Rights Violations*, supra note 262; Report of the Int’l Law Comm’n on the Work of its Fifty-third Session, Draft Articles on Responsibility of States for Internationally Wrongful Acts and Commentary, U.N. GAOR, 56th Sess., Supp. No. 10, at 26-143, U.N. Doc. A/56/10 (2001), arts 4-11; Shelton, supra note 262, pp. 15-26; Farrior, supra note 262.

284. Human Rights Comm., General Comment No. 31, supra note 278, ¶ 8.

285. CDC WISQARS, supra note 3.

responsible for human rights violations resulting from their actions.

Likewise, State responsibility is engaged when the State *knows or ought to know* that a person is at risk of violence by a non-State actor or that violations have occurred and it fails to take reasonable measures to protect the vulnerable person.²⁸⁶ The Committee against Torture has explained that:

where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed *by non-State officials or private actors* and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors . . . the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts.²⁸⁷

The responsibility of the State to prevent private human rights violations is particularly appropriate if “the failure of the state to intervene encourages and enhances the danger of privately inflicted harm.”²⁸⁸ As the Committee against Torture has explained, a State’s failure “to exercise due diligence to intervene to stop, sanction, and provide remedies to victims . . . facilitates and enables non-State actors to commit [impermissible acts] with impunity” and, as such, “the State’s indifference or inaction provides a form of encouragement and/or de facto permission.”²⁸⁹

286. See U.N. Human Rights Council, *Report of the Commission of Inquiry on Burundi*, ¶ 28, U.N. Doc. A/HRC/39/63 (Aug. 8, 2018) (“The State has a duty to protect the human rights of persons under its jurisdiction, in particular when it knows or should have known of violations or abuses committed by third parties”). See, e.g., *Z and others v. United Kingdom*, Application no. 29392/95, Eur. Ct. H.R. (May 10, 2001) (finding the United Kingdom responsible for failing to protect against inhuman and degrading treatment perpetrated against children by their family, especially because State social services had been monitoring the family while the abuse continued and knew or should have known about it). See generally Ingrid Nifosi-Sutton, *THE PROTECTION OF VULNERABLE GROUPS UNDER INTERNATIONAL HUMAN RIGHTS LAW* (2017).

287. CAT, General Comment No. 2, *supra* note 269, ¶ 18. The Committee notes that it has applied this reasoning to “States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.” *Id.*

288. *Id.* ¶ 15.

289. *Id.* ¶ 18. Although this statement was made in reference to victims of torture, it is analogous to

States have a special responsibility to protect and prevent abuses “in all contexts of custody or control, for example, in . . . schools [and] institutions that engage in the care of children.”²⁹⁰ In *Larez v. Bolivarian Republic of Venezuela*, for example, the Committee against Torture found that Venezuela was responsible for failing to prevent prisoner-on-prisoner violence that amounted to ill-treatment in a State-run penitentiary.²⁹¹ Conduct by private individuals or organizations that perform a public function are also attributable to the State.²⁹² The Committee on the Elimination of Racial Discrimination,²⁹³ the European Court of Human Rights,²⁹⁴ and the Inter-American Commission on Human Rights²⁹⁵ have each found States responsible for human rights violations within schools, even private schools. The Committee on the Elimination of Racial Discrimination has explained that “[t]o the extent that private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the

other serious human rights abuses.

290. *Id.* ¶ 15.

291. *Larez v. Bolivarian Republic of Venezuela*, Communication No. 456/2011, U.N. Comm. Against Torture, U.N. Doc. CAT/C/54/D/456/2011 (June 26, 2015).

292. Hessbruegge, *Human Rights Violations*, *supra* note 262, at 59-64. *See also* Draft Articles, *supra* note 275, art. 5 and commentary, at 42-43. The Human Rights Committee has stated that “a State Party is not relieved of its obligations under the Covenant when some of its Functions are delegated to other autonomous organs.” *B.d.B. v. The Netherlands*, Communication No. 373/1988, Human Rights Comm., U.N. Doc. CCPR/C/35/D/273/1988 (Feb. 5, 1989). This reasoning has been applied to hold the State responsible for the acts of an industrial board *id.*, a church that maintained a graveyard, *X v. F.R.G.*, Application No. 8363/78, 20 Eur. Comm’n H.R. Dec. & Rep. 163, 166 (1980), and a professional body which the government relied upon to fulfill its obligation to provide legal aid. *Van der Mussele v. Belgium*, 70 Eur. Ct. H.R. (ser. A) (1983).

293. *See, e.g.*, *Mahali Dawas and Yousef Shava v. Denmark*, Communication No. 46/2009, Comm. on the Elimination of Racial Discrimination, Opinion Adopted by the Committee at its Eightieth Session, U.N. Doc. CERD/C/78/DR/45/2009, ¶ 7.3 (Apr. 2, 2012) (“the State party cannot disclaim its responsibility, since the head teacher of a public school, although being a separate legal entity, has the remit to select school personnel in the context of the exercise of a public service.”).

294. *Costello-Roberts v. United Kingdom*, Application No. 89/1991/341/414, Eur. Ct. H.R. (ser. A) (Feb. 23, 1993) (finding the U.K. responsible for corporal punishment carried out in a private school by private actors and that a State could not “absolve itself from responsibility [to secure a Convention right] by delegating its obligations to private bodies or individuals.” *Id.* at 27).

295. *See, e.g.*, Press Release: *IACHR Takes Case Involving Ecuador to the Inter-American Court of Human Rights*, OAS (Feb. 13, 2019), www.oas.org/en/iachr/media_center/PReleases/2019/032.asp [hereinafter IACHR, *Paola del Rosario Guzmán Albarracín case*] (the Commission found the State responsible for failing to protect the rights of a student who was sexually abused by her public school’s assistant principal and school doctor and whom committed suicide as a result).

effect of creating or perpetuating racial discrimination.”²⁹⁶

V. HUMAN RIGHTS IMPACTED BY GUN VIOLENCE

The threat posed by gun violence to human rights is well known. In 2016, former U.N. High Commissioner for Human Rights, Prince Zeid Ra’ad al-Hussein, released a report detailing the human rights concerns associated with the private purchasing, possession, and use of guns. The report noted that “[f]irearms-related violence and insecurity . . . pose direct risks to the rights to life, security and physical integrity, and also affect other civil, political, social, economic and cultural rights such as the rights to health, education, an adequate standard of living and social security and the right to participate in cultural life.”²⁹⁷ The report called for all States to protect their citizens from the violence associated with the sale and use of guns.²⁹⁸ The following section catalogs the rights impaired by the U.S. gun violence crisis.

A. *The Right to Life*

It is sometimes quipped that in the United States, the right to life “ends at birth.”²⁹⁹ This is because the U.S. Constitution, unlike constitutions around the world,³⁰⁰ does not include a provision protecting the right to life, although the Declaration of Independence declared it to be an “unalienable Right”³⁰¹ and the Due Process Clause of the U.S.

296. CERD, General Recommendation XX, *supra* note 268.

297. Rep. of OHCHR 2016, *supra* note 8, ¶ 52.

298. *Id.* ¶ 53.

299. See, e.g., Russell Jacoby, *Excellent Writers, Facile Thinkers*, CHRON. HIGHER EDUC. (Feb. 2, 2007), at B17 (noting that for conservatives who oppose reproductive rights and do not support social programs to help the living, the right to life “ends at birth”).

300. See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, C 11 (U.K.) (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”) (emphasis added); India Const. art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law”); S. Afr. Const., 1996, art. 11 (“Everyone has the right to life”); Grundgesetz [GG][Basic Law], art. 2(2) (Ger.), *translation at* www.gesetze-im-internet.de/englisch_gg/index.html (“Every person shall have the right to life and physical integrity. . . . These rights may be interfered with only pursuant to a law”).

301. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Constitution provides protection from its the arbitrary denial.³⁰² In the United States, conversations about the “right to life” are typically about protecting the unborn by prohibiting abortion. Under international law, in contrast, the right to life for all living human beings³⁰³ is a *jus cogens* norm that is non-derogable under treaty³⁰⁴ and customary international law.³⁰⁵ The human right to life is fundamental to the enjoyment of other human rights.³⁰⁶ Codified in article 3 of the Universal Declaration of Human Rights,³⁰⁷ it has since been incorporated into all major human rights instruments,³⁰⁸ including article 6(1) of the International Covenant on Civil and Political Rights, which provides that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”³⁰⁹

Because of its fundamental importance, the Human Rights Committee

302. U.S. CONST. amends. V & XIV.

303. International law makes a distinction between unborn and born, or living, individuals. *See* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY 189 [8.55] (SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, EDs., 2D, 2005) (“Anti-abortion advocates argue that abortion constitutes a breach of the right to life of an unborn baby. However, the HRC has not adopted this position.”). *See, e.g.*, *Evans v. United Kingdom*, Application No. 6339/0543, Eur. Ct. H.R. 21 (2006) (ruling that unborn life was not protected under article 2 of the European Convention on Human Rights, which protects the right to life).

304. *See, e.g.*, ICCPR, *supra* note 228, art. 6; European Convention, *supra* note 243, art. 2; Banjul Charter, *supra* note 243, art. 4. *See also*, Restrictions to the Death Penalty, Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3, ¶ 61 (Sept. 8, 1983).

305. *See, e.g.*, *Victims of the Tugboat ‘13 de Marzo’ v. Cuba*, Case 11.436, Inter-Am. Comm’n H.R., Report No. 47/96, OEA/Ser.L/V/II.95 Doc. 7 rev., ¶ 79 (Oct. 16, 1996). *See also* Domingues v. United States, *supra* note 250.

306. Some gun rights advocates in the United States have argued for a new human right to self-defense that would be on par with the right to life. *See, e.g.*, David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43 (2007). This has not been recognized by the human rights community. Rather, self-defense is a justification for what would otherwise be a homicide and is not a right within itself. *See generally* JAN ARNO HESSBRUEGGE, HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW (2017). *See also* John Cerone, *Is There a Human Right to Self-Defense?*, 2 J.L. ECON. & POL’Y 319, 319 (2006) (“there is no norm of international law providing a human right to self-defense.”).

307. UDHR, *supra* note 225, art. 3.

308. *See* the Banjul Charter, *supra* note 243, art. 4; the Arab Charter on Human Rights, *supra* note 243, arts. 5 & 6; the European Convention on Human Rights, *supra* note 243, art. 2; the American Convention on Human Rights, *supra* note 243, art. 4; the Charter of Fundamental Rights of the European Union, European Union, *supra* note 243, art. 2; the American Declaration, *supra* note 243, art. 1; and the ASEAN Human Rights Declaration, *supra* note 243, art. 11.

309. ICCPR, *supra* note 228, art. 6.

has found that the right to life “should not be interpreted narrowly.”³¹⁰ States must abstain from violating the right to life and ensure that all individuals under its jurisdiction enjoy it. A State violates this obligation when it does not take sufficient measures to protect individual life, particularly when faced with reoccurring and predictable violations.³¹¹ The European Court of Human Rights, for example, held in *Renolde v. France* that French authorities violated the right to life of a prisoner by not preventing his suicide when there was a clear indication that he was endangered.³¹² Likewise, in *Budayeva v. Russia*, the Court found the Russian Federation responsible for a violation of the right to life by failing to take appropriate measures to protect the inhabitants of a village against a deadly mudslide.³¹³ According to the Inter-American Court of Human Rights, States must “adopt all necessary measures to create a legal framework that deters any possible threat to the right to life; to establish an effective legal system to investigate, punish, and redress deprivation of life by State officials or private individuals; and guarantee the right to unimpeded access to conditions for a dignified life.”³¹⁴

The Human Rights Committee’s new General Comment No. 36 provides that the “deprivation of life involves an intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission”³¹⁵ and calls for States to “take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include high levels of criminal and gun violence.”³¹⁶ These measures should include efforts by States to “reduce the proliferation of potentially lethal weapons to unauthorized individuals.”³¹⁷

310. Human Rights Comm., General Comment No. 36: on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 3, U.N. Doc. CCPR/C/GC/36 (2018).

311. Human Rights Comm., General Comment No. 31, *supra* note 278, ¶ 15 (“Cessation of an ongoing violation is an essential element of the right to an effective remedy”).

312. *Renolde v. France*, Application No. 5608/05, 24 Eur. Ct. H.R. (2008).

313. *Budayeva v. Russia*, Application No. 27065/05, 24 Eur. Ct. H.R. (2010).

314. *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C), ¶ 66 (July 5, 2006).

315. Human Rights Comm., General Comment No. 36, *supra* note 310, ¶ 6.

316. *Id.* ¶ 26.

317. *Id.* ¶ 21.

As noted in Parts I and II above, gun violence in the United States took the lives of more than 39,700 individuals in 2017 and more than 80% of homicides and 60% of suicides in the United States involve firearms. The level of violence present in the United States, the almost unrestricted availability of guns, and the refusal of public officials to adopt reasonable measures to keep guns out of the hands of dangerous or at-risk individuals, such as domestic abusers and children, evince the abject failure of the United States to fulfill its “due diligence obligation to undertake reasonable positive measures”³¹⁸ to protect against a foreseeable and preventable threat to the right to life.

Killings by private individuals under so-called “Stand Your Ground laws” impinge upon the right to life. Stand Your Ground laws have a disparate impact on individuals of color, whose deaths are likely to be ruled justified in questionable cases, especially if the shooter is white.³¹⁹ The adoption of these laws violates the State’s obligation “to investigate and, where appropriate, prosecute . . . incidents including allegations of excessive use of force with lethal consequences”³²⁰ and the victim’s right to an effective remedy. Indeed, the Committee on the Elimination of Racial Discrimination has described Stand Your Ground laws as a way to “circumvent the limits of legitimate self-defence, in violation of the State Party’s duty to protect life.”³²¹

Police killings also represent a problem under human rights law. The deprivation of life by State actors is of “the utmost gravity.”³²² Article 3 of the Code of Conduct for Law Enforcement Officers, adopted by the U.N. General Assembly in 1979, provides that “[l]aw enforcement officials may use force only when strictly necessary” and the commentary adds that “the use of firearms is considered an extreme measure.”³²³ U.S. police officers

318. *Id.* This should include “legislative and other measures.” *Id.* ¶ 4.

319. *Supra* notes 57-58 and accompanying text.

320. Human Rights Comm., General Comment No. 36, *supra* note 310, ¶ 27. The failure to punish violations of the right to life, including as a result of lenient laws or application of the law related to intentional killings, may amount to a violation of the right to life. *See, e.g.*, Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Paraguay, U.N. Doc. CCPR/C/79/Add.48 (Oct. 3, 1995) (criticizing Paraguay’s lenient infanticide laws as a violation of the right to life).

321. CERD, Concluding Observations 2014, *supra* note 254, ¶ 16.

322. Human Rights Comm., General Comment No. 36, *supra* note 310, ¶ 19.

323. G.A. Res. 34/169, annex, Code of Conduct for Law Enforcement Officials, at 186 (Dec. 17,

shoot and kill nearly 1000 people every year, with individuals of color disproportionately affected. While not formally binding, this codification of best practices suggests that the United States has a duty to “take all necessary measures intended to prevent arbitrary deprivations of life by their law enforcement officials [which includes] procedures designed to ensure that law enforcement actions are adequately planned in a manner consistent with the need to minimize the risk they pose to human life.”³²⁴ Education,³²⁵ de-escalation and bias training,³²⁶ the adoption of revised guidelines on when officers are allowed to use lethal force, and appropriate investigation and punishment of police killings would all be appropriate given the current situation in the United States. Although training and internal regulations of police forces are generally governed by states, the federal government plays a significant role in providing guidelines and setting standards.

Finally, firearms and suicide are intrinsically linked: roughly two-thirds of all U.S. gun deaths are suicides. Not only is easy access to firearms correlated with higher suicide rates, but the use of a gun in a suicide attempt makes it fatal more than 80% of the time. The European Court of Human Rights,³²⁷ Inter-American Commission on Human Rights,³²⁸ and

1979). *See also* Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, Inter-Am. Ct. H.R., *supra* note 314, ¶ 68 (“The use of firearms and lethal force against people by law enforcement officers -which must be generally forbidden- is only justified in even more extraordinary cases. The exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all cases, but never exceeding that use “absolutely necessary” in relation to the force or threat to be repealed. When excessive force is used, any deprivation of life is arbitrary.” Internal citations omitted).

324. Code of Conduct for Law Enforcement Officials, *supra* note 323.

325. *See* Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, *supra* note 314, ¶¶ 77-78 (recommending the education and training of law enforcement officers in addition to legislative changes in protect the right to life).

326. *See* ICERD, *supra* note 227, art. 7 (requiring States to adopt measures in the fields of teaching and education to combat prejudices that lead to discrimination); Comm. on the Elimination of Racial Discrimination, General Recommendation XIII on the Training of Law Enforcement Officials in the Protection of Human Rights *in* U.N. Doc. A/48/18 at 113, ¶ 3 (1993) (calling on States Parties to “review and improve the training of law enforcement officials so that the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented”).

327. *See, e.g.*, Renolde v. France, *supra* note 312 (holding France responsible for failing to prevent the suicide of a prisoner).

328. *See, e.g.*, IACHR, *Paola del Rosario Guzmán Albarracín case*, *supra* note 295 (finding the Ecuadorian State responsible for violations to the right to life resulting from the suicide of a teenage girl who was sexually abused by leadership at her school).

the Human Rights Committee³²⁹ have all found that “States should take adequate measures . . . to prevent suicides.”³³⁰ This could include limiting firearm access to at-risk individuals through mandatory waiting periods for gun purchases, safe-storage laws, and red flag bills.³³¹

The Human Rights Committee has acknowledged that gun violence can violate the duty to protect life and has requested the United States to “take all necessary measures to abide by its obligation to effectively protect the right to life.”³³² More than two decades ago, during the its first review of the United States in 1995, the Committee stated that it “regrets the easy availability of firearms to the public and the fact that federal and state legislation is not stringent enough in that connection to secure the protection and enjoyment of the right to life and security of the individual guaranteed under the Covenant.”³³³ The situation is far worse today.

B. The Right to Security of Person

All human beings have a right to security of person. This right is found in article 3 of the Universal Declaration of Human Rights³³⁴ and article 9(1) of the International Covenant on Civil and Political Rights.³³⁵ Likewise, article 5(b) of International Convention on the Elimination of all forms of Racial Discrimination guarantees “[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or

329. See, e.g., Guillermo Ignacio Dermit Barbato et al. v. Uruguay, Communication No. 84/1981, Human Rights Comm., U.N. Doc. CCPR/C/OP/2 (1990) (finding that Uruguayan officials were responsible by act or omission for failing to take adequate measures to protect the life of a prisoner, even though it could not be established if he committed suicide in prison like authorities claimed, that he was driven to suicide, or that he had been killed while in confinement).

330. Human Rights Comm., General Comment No. 36, *supra* note 310, ¶ 9.

331. *Supra* notes 128, 137, 138 and accompanying text; Michael D. Anestis & Joye C. Anestis, *Suicide Rates and State Laws Regulating Access and Exposure to Handguns*, 105 AM. J. PUBLIC HEALTH 2049 (2015) (finding that each of four handgun laws – waiting periods, universal background checks, gun locks, and open carrying regulations – was associated with significantly lower firearm suicide rates and the proportion of suicides committed with guns).

332. Human Rights Comm., Concluding Observations 2014, *supra* note 254, ¶ 10.

333. Human Rights Comm., Concluding Observations 1995, *supra* note 254, ¶ 17. The Committee was also “concerned at the reportedly large number of persons killed, wounded or subjected to ill-treatment by members of the police . . .” *Id.*

334. UDHR, *supra* note 225, art. 3.

335. ICCPR, *supra* note 228, art. 9(1).

institution.³³⁶ The right is also included in most regional human rights instruments.³³⁷

A State violates the right to security when it has not taken appropriate measures to combat legitimate threats to the security of a person under its jurisdiction.³³⁸ The obligation of the State to protect against threats to the security of a person is especially engaged when faced with “patterns of violence against categories of victims such as . . . violence against women, including domestic violence³³⁹ and racial discrimination. The Human Rights Committee has called on States to “protect their populations . . . against the risks [to security] posed by excessive availability of firearms.”³⁴⁰

Gun violence and the proliferation of firearms are endangering the security of individuals living in the United States. Women and children in domestic violence situations are left vulnerable by loopholes that allow their abusers to acquire guns,³⁴¹ and people of color are often victimized by excessive force used by law enforcement officials or by individuals acting under Stand Your Ground laws, acts of firearm violence which are rarely punished by the State.³⁴² More broadly, daily gun violence threatens the security of all members of the U.S. population, whether they are going to school, worshipping, attending a concert, banking,³⁴³ shopping for

336. ICERD, *supra* note 227, art. 5(b).

337. *See, e.g.*, Banjul Charter, *supra* note 243, art. 6; American Convention, *supra* note 243, art. 7; European Convention, *supra* note 243, art. 5; Arab Charter on Human Rights, *supra* note 243, art. 5; Charter of Fundamental Rights of the European Union, *supra* note 243, art. 6; ASEAN Human Rights Declaration, *supra* note 243, art. 11; American Declaration, *supra* note 243, art. I.

338. *See, e.g.*, Páez v. Colombia, Merits, Communication No. 195/1985, ¶¶ 5.4-6, Human Rights Comm., U.N. Doc. CCPR/C/39/D/195/1985 (July 12, 1990) (finding that Colombia failed to adequately protect the life of a person under its jurisdiction who was subjected to death threats from non-State actors); Rajapakse v. Sri Lanka, Merits, Communication No. 1250/2004, ¶¶ 9.7-10, U.N. Doc. CCPR/C/87/D/1250/2004 (July 14, 2006) (finding that Sri Lanka violated the petitioner’s right to security by ignoring threats made against him by police officers and stating that “a State party [is not allowed to] ignore threats to the personal security of non-detained persons subject to its jurisdiction”).

339. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and security of person), ¶ 9, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

340. *Id.*

341. *Supra* notes 115-118 and accompanying text. *See also supra* notes 45-49.

342. *Supra* notes 50-58 and accompanying text.

343. *See, e.g.*, Gina Martinez, *These Are the 5 Women Killed in the Florida Bank Shooting*, TIME (Jan. 25, 2019), [time.com/5513090/florida-bank-shooting-victims/](https://www.time.com/5513090/florida-bank-shooting-victims/) (a gunman shot and killed five women in a bank).

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groceries,³⁴⁴ eating at a restaurant,³⁴⁵ waiting for a bus or sitting in a car,³⁴⁶ or even while in their home.³⁴⁷

C. *The Right to Health*

Americans might be surprised to learn that they have a human right to health³⁴⁸ that is enshrined in several major human rights instruments³⁴⁹ and which has arguably evolved into a norm of customary international law.³⁵⁰

344. See, e.g., Niraj Chokshi, *Kroger Shooting Suspect Is Charged With Hate Crimes in Killings of 2 Black People*, N.Y. TIMES (Nov. 15, 2018), www.nytimes.com/2018/11/15/us/kroger-shooting-charges-louisville.html (two individuals shot dead in a Kentucky grocery store); *Prosecutor: Elkhart Cops Were Justified Shooting Gunman In Supermarket Slayings*, CBS-CHICAGO (Mar. 27, 2014), <https://chicago.cbslocal.com/2014/03/27/prosecutor-elkhart-cops-were-justified-shooting-gunman-in-supermarket-slayings/> (a customer and employee were shot dead in an Indiana grocery store before the shooter was killed by police).

345. See, e.g., Amir Vera, *What we Know About the Tennessee Waffle House Shooting*, CNN (Apr. 23, 2018), www.cnn.com/2018/04/22/us/waffle-house-shooting-what-we-know/index.html (a gunman killed four people with an AR-15 style assault rifle at a restaurant outside Nashville, Tennessee).

346. See, e.g., Editorial Board, *Why is There so Much Shooting and Killing in Chicago?*, CHICAGO TRIBUNE (Aug. 7, 2018), www.chicagotribune.com/news/opinion/editorials/ct-edit-shooting-chicago-violence-police-20180807-story.html (numerous stories of random public shootings in Chicago, including a man shot and killed waiting for a bus); Emily Sullivan, *Pair Guilty of First-Degree Murder in Killing of Toddler Aiden McClendon*, FLORIDA TIMES-UNION – JACKSONVILLE (July 3, 2018), www.jacksonville.com/news/20180703/pair-guilty-of-first-degree-murder-in-killing-of-toddler-aiden-mcclendon (a 22-month child was shot and killed in his family's car in a drive-by shooting).

347. See, e.g., Molly Sullivan, *3 Arrested in Shooting That Killed 3-Year-Old Girl in South Sacramento*, SACRAMENTO BEE (Jan. 3, 2019), www.sacbee.com/news/local/crime/article223883040.html (a 3-year-old girl was killed in her home when a bullet penetrated her living room wall in South Sacramento, CA).

348. See generally Virginia A. Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH HUM. RIGHTS 24 (1994). In President Roosevelt's 1944 State of the Union Address to Congress, he suggested the creation of a "Second Bill of Rights" which would have included the right to adequate medical care and the opportunity to enjoy good health. He died within months of the speech. Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 207-09 (2005).

349. UDHR, *supra* note 225, art. 25; American Declaration, *supra* note 243, art. XI; ICERD article 5(e)(iv); ICESCR, *supra* note 232, art. 12(1); CRC, *supra* note 231, art. 24(1). Many provisions of these treaties, including arguably the right to health, are part and parcel of customary international law. See, e.g., Patrick L. Wojahn, *A Conflict of Rights: Intellectual Property under TRIPS, the Right to Health, and AIDS Drugs* 6 UCLA J. INT'L L. & FOREIGN AFF. 463, 494 (2001-2002) ("there is considerable support for the proposition that the rights embodied in the ICESCR should be considered part of customary law").

350. Lesley Stone et al., *When the Right to Health and the Right to Religion Conflict A Human Rights Analysis*, 12 MICH. ST. J. INT'L L. 247, 268 n. 87 (2004) ("the right to health . . . is likely customary international law"). See also Thomas Buergenthal, *The Right to Health in the Americas*,

The Constitution of the World Health Organization states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being,” and defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”³⁵¹ The U.S. government has a clear obligation to protect the health and well-being of its citizens.³⁵² The U.N. Committee on Economic, Social and Cultural Rights, in reference to the right to the highest attainable standard of health found in article 12 of the Covenant, has declared that “[t]he obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees.”³⁵³

The American Medical Association (AMA) and the American College of Physicians (ACP) have observed that gun violence in the United States has become a public health crisis.³⁵⁴ Homicides and non-fatal injuries, suicides, accidental deaths and injuries, and mental health issues³⁵⁵ are

PAN-AMERICAN HEALTH ORGANIZATION, SCIENTIFIC PUBLICATION NO. 509, THE RIGHT TO HEALTH IN THE AMERICAS 11 (Hernan L. Fuenzalida-Puelma & Susan Scholle Conner eds., 1989). *But see* Lawrence O. Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 MD. L. REV. 20, 109 (2004) (“universal acceptance of a broad right to health may . . . not occur for an extended period of time”). Almost every country has either included the right to health in their constitutions or acceded to an international instrument containing it. Eleanor D. Kinney, *The International Human Right to Health: What Does This Mean for Our Nation and World?* 34 IND. L. REV. 1457, 1464 (2001); Stephen P. Marks, *The Emergence and Scope of the Human Right to Health*, in *ADVANCING THE HUMAN RIGHT TO HEALTH* 3, 20 (José M. Zuniga et al., eds. 2013).

351. WHO Constitution, *supra* note 233, preamble.

352. *Id.* (“[g]overnments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.”).

353. Comm. on Economic, Social and Cultural Rights (CESCR), General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶ 33, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

354. In 2015, the American College of Physicians, American College of Surgeons, American College of Obstetricians and Gynecologists, American Public Health Association, American Psychiatric Association, American Academy of Family Physicians, American Academy of Pediatrics, American College of Emergency Physicians, and American Bar Association called for gun violence to be treated as a public health threat. This call was subsequently endorsed by 52 additional organizations. Steven E. Weinberger et al., *Firearm-related injury and death in the United States: a call to action from 8 health professional organizations and the American Bar Association*, 162 ANN INTERN MED 513 (2015).

355. The right to health includes mental well-being. *See* WHO Constitution, *supra* note 233, preamble (“Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”).

exacerbated by the easy availability of firearms and lax regulations. Indeed, in June 2018, the AMA characterized the U.S. gun violence crisis as “menacing as a lethal infectious disease.”³⁵⁶ Both the AMA and ACP, along with other leading professional medical organizations, have endorsed gun control measures, including universal background checks, an assault weapons ban, legislation requiring licensing and safety courses for gun owners, mandatory firearm registration, federal bans on gun possession for all domestic violence offenders, the enactment of extreme risk protection orders, and have denounced the idea of arming teachers.³⁵⁷ They have received little support from lawmakers, however. While many diseases and traumatic injuries that lead to a comparably small loss of life are the subject of well-funded research projects and grants, gun violence lags far behind.³⁵⁸ Gun violence research receives considerably less public funding than diseases, other traumatic injuries, or threats to public health and safety that have considerably less impact on Americans, in large part due to roadblocks like the Dickey Amendment.³⁵⁹

D. The Right to be Free from Ill-Treatment

The words torture and cruel treatment conjure up images of Syrian prisons, Russian gulags, or the treatment of prisoners brought to Guantanamo Bay. Yet international human rights bodies and courts have consistently held that the legal definitions of torture and cruel, inhumane, or degrading treatment (known together as “ill-treatment”) can, under the

356. Associated Press, *Frustrated American Medical Association Adopts Sweeping Policies Aimed at Gun Violence*, NBC NEWS (Jun. 13, 2018), www.nbcnews.com/news/us-news/frustrated-american-medical-association-adopts-sweeping-policies-cut-gun-violence-n882681.

357. See, e.g., The Health & Public Policy Committee of the American College of Physicians, *Reducing firearm-related injuries and deaths in the United States: executive summary of a policy position paper from the American College of Physicians*, 160 ANN. INTERN. MED. 858 (2014); The Health & Public Policy Committee of the American College of Physicians, *Reducing Firearm Injuries and Deaths in the United States: A Position Paper From the American College of Physicians*, 169 ANN. INTERN. MED. 704 (2018); Kimberly Leonard, *American Medical Association Calls Gun Violence a Public Health Crisis*, U.S. NEWS (June 14, 2016), www.usnews.com/news/articles/2016-06-14/ama-calls-gun-violence-a-public-health-crisis.

358. See Niall McCarthy, *Does Gun Violence Get Enough Federal Funding*, STATISTA (Mar. 5, 2018), www.statista.com/chart/13126/does-gun-violence-get-enough-federal-research-funding/. See also *supra* note 142 and works cited.

359. See *supra* notes 139-142 and accompanying text.

right conditions, encompass more ubiquitous and common-place acts including domestic violence and child abuse. International law is clear – all humans have the right to be free from torture and ill-treatment. This is a *jus cogens* norm.³⁶⁰ This right is found in the Convention against Torture,³⁶¹ the International Covenant on Civil and Political Rights,³⁶² and is accepted as customary international law.³⁶³ Although no single provision in the U.S. Constitution expressly prohibits torture and ill-treatment, the U.S. government has emphasized that “[p]rotection against torture and cruel, inhuman or degrading punishment or treatment is provided by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution and through U.S. federal and state laws, both criminal and civil.”³⁶⁴ It is our submission that the harm from gun violence is so extensive – and so preventable – that the government’s failure to address it has subjected the U.S. population, or at least subsets of the U.S. population, to ill-treatment under international law.³⁶⁵

360. *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, ¶¶ 155-57 (ICTY, Dec. 10, 1998); KAREN MUSALO ET AL. REFUGEE LAW AND POLICY: CASES AND MATERIALS 338 (“under international law, the prohibition against torture has attained the status of peremptory or *jus cogens* norm, from which no deviation is allowed.”); Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EURO. J. INT’L L. 91 (2004). Several international and regional human rights instruments specifically forbid derogations from the prohibitions against torture and/or ill-treatment. *See, e.g.*, UNCAT, *supra* note 229, art. 2; UDHR, *supra* note 225, art. 5; ICCPR, *supra* note 228, art. 7; American Convention, *supra* note 243, art. 27(2); European Convention on Human Rights, *supra* note 243, art. 15(2); Arab Charter on Human Rights, *supra* note 243, art. 4(c). *See also* CAT, General Comment No. 2, *supra* note 269, ¶ 1.

361. UNCAT, *supra* note 229, arts. 1 & 16.

362. ICCPR, *supra* note 228, art. 7. *See also* article 3 of all four Geneva Conventions; European Convention on Human Rights, *supra* note 243, art. 3; American Convention, *supra* note 243, art. 5(2); Banjul Charter, *supra* note 243, art. 5; Arab Charter on Human Rights, *supra* note 243, art. 13(a); Charter of Fundamental Rights of the European Union, *supra* note 243, art. 4; ASEAN Human Rights Declaration, *supra* note 243, art. 14.

363. *See* RESTATEMENT, *supra* note 243, § 702; *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980) (before the Torture Convention came into force, holding that torture violates customary international law and that this prohibition is part of U.S. law); DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 465-66 (Paul T. Lufkin, ed., 3d ed. 1999); Hannum, *supra* note 245, n. 332. *See also supra* note 360.

364. U.S. State Dept., *Common Core Documents Forming Part of the Reports of States Parties – United States of America*, HRI/CORE/USA/2011, ¶ 130 (Sept. 12, 2012).

365. We do not argue it is tantamount to torture under article 1 of UNCAT, because, as a whole, gun violence in the United States is not carried out for one of the impermissible purposes. Article 1 requires that torture be “intentionally inflicted . . . for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason

As Part I demonstrated, the threat of gun violence that many Americans live with daily, as well as the frequent mass and school shootings, has fostered a culture of fear, caused severe emotional distress, and resulted in significant psychological trauma that may amount to ill-treatment.³⁶⁶ Article 16 of Convention against Torture states, in pertinent part:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³⁶⁷

Mass shootings in schools, offices, bars, movie theaters, and places of worship, as well as at political rallies and concerts, cause severe physical and mental injury and emotional suffering of those directly involved and result in collective harm. These increasingly frequent occurrences have generated anxiety in individuals who are attempting to go about their regular routines, attend schools, and participate in the cultural life of their communities.³⁶⁸ More specifically, as detailed above, subsets of the U.S. population, including public school children, women subjected to domestic violence,³⁶⁹ and people of color, experience high and unrelenting levels of violence that may amount to ill-treatment. As Juan E. Méndez, former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, stated: “[w]hen States are aware of a

based on discrimination of any kind. . . .” UNCAT *supra* note 229, art. 1. Moreover, the physiological trauma caused by gun violence is not inflicted “intentionally” as the word is commonly interpreted in the context of article 1. See Oona Hathaway et al., *Tortured Reason: The Intent to Torture Under International and Domestic Law*, 52 VA. J. INT’L L. 791, 823-829 (2012) (on the intentionality requirement).

366. See Sadat & George, *supra* note 2, Section II(C): Mental and Psychological Harm Caused By Gun Violence and Mass Shootings.

367. UNCAT, *supra* note 229, art. 16.

368. This argument has also been put forth by the U.N. High Commissioner for Human Rights. See Rep. of OHCHR 2016, *supra* note 8, ¶ 52.

369. The Committee against Torture has stated that domestic violence may constitute torture or ill-treatment. CAT, General Comment No. 2, *supra* note 269, ¶ 18. See also *M.C. v. Bulgaria*, 2003-I Eur. Ct. H.R. 646 (2003) (finding that a State’s failure to adequately investigate and prosecute rape by a private actor amounted to ill-treatment).

pattern of violence or the targeting of specific groups by non-State actors, their due diligence obligations are likewise engaged and they are required actively to monitor and review data, apprise themselves of trends and respond appropriately.”³⁷⁰

Harm does not have to be physical to qualify as torture or ill-treatment³⁷¹ and “acts that cause mental suffering” may violate the prohibition against ill-treatment,³⁷² particularly when that mental pain is met with indifference by authorities to assist or reduce the harm.³⁷³ The Committee against Torture has defined the victims of an act of torture or ill-treatment as “persons who have individually or collectively suffered harm, including physical or *mental injury, emotional suffering*, economic loss or *substantial impairment of their fundamental rights*, through acts or *omissions* that constitute violations of the Convention.”³⁷⁴ Thus, in addition to the high rates of PTSD and depression that gunshot victims suffer, the well-demonstrated psychological effects that pervade U.S. communities due to the ever-present threat of gun violence and mass shootings can amount to ill-treatment under international law.

E. The Right to be Free from Racial Discrimination

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution declares that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”³⁷⁵ This provision has been relied upon to address the problem of racial discrimination in the United

370. Juan E. Méndez, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, ¶ 11, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016).

371. UNCAT, *supra* note 229, art. 1 (the definition of torture includes “severe pain or suffering, whether physical or mental . . .”).

372. Human Rights Comm., General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 5 (Mar. 10, 1992), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

373. *See, e.g.,* Larez v. Bolivarian Republic of Venezuela, *supra* note 291, ¶ 6.10 (finding that the anguish and distress caused to the family of a man who was disappeared and whose body was never returned, which was met with indifference from authorities, amounted to a violation of the prohibition against ill-treatment).

374. CAT, General Comment No. 3, *supra* note 273, ¶ 3.

375. U.S. CONST. amend. XIV. *See also* U.S. CONST. amend. V.

States.³⁷⁶ Like U.S. law, international human rights law guarantees all individuals equality and protection from discrimination and provides that everyone be entitled to the same enjoyment of fundamental rights regardless of race or ethnicity.³⁷⁷ Discrimination includes “any distinction, exclusion, restriction or preference which is based on any ground . . . which has *the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”³⁷⁸ This is arguably even broader than the protection afforded by the U.S. Constitution because it expressly prohibits facially neutral laws that have a discriminatory effect. Yet, as detailed above, communities of color disproportionately suffer from U.S. gun violence.³⁷⁹

Stand Your Ground Laws, which are in force in at least twenty-eight states, have been found to have a racially discriminatory affect,³⁸⁰ and are a significant obstacle to reducing U.S. firearm violence.³⁸¹ Recent studies show that Stand Your Ground laws are often applied in a biased manner

376. For example, this provision was the basis for *Brown v. Board of Education*, 347 U.S. 483 (1954).

377. This right exists in both treaty and customary law. For examples of it in international and regional treaties and human rights instruments, see ICERD, *supra* note 227; ICCPR, *supra* note 228, art. 26; UDHR, *supra* note 225, art. 2; European Convention on Human Rights, *supra* note 243, arts. 1 & 14; American Convention on Human Rights, *supra* note 243, arts. 1(1) & 24; Banjul Charter, *supra* note 243, art. 2; Arab Charter on Human Rights, *supra* note 243, art. 2; Charter of Fundamental Rights of the European Union, *supra* note 243, art. 21(1); ASEAN Human Rights Declaration, *supra* note 243, art. 3. The prohibition against racial discrimination is also part of customary law. Hannum, *supra* note 245, n. 227 and accompanying text.

378. Human Rights Comm., General Comment No. 18: Non-discrimination, (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

379. See *supra* notes 25-28, 34-37, 51 and 58 and accompanying text.

380. See Roman, *supra* note 58; Ackermann et al., *supra* note 58; Purdie-Vaughns & Williams, *supra* note 58.

381. Perhaps no case brought Stand Your Ground laws to the public consciousness as much as that of Trayvon Martin, an unarmed black high school student on a public street. Although the lawyer for his shooter ultimately did not raise a Stand Your Ground defense at trial, the provision’s language was contained in the jury instructions and was cited by jurors as a factor in their verdict of acquittal. The law also was invoked by law enforcement as a reason for not arresting the shooter for nearly six weeks after the fatal shooting. See Lizette Alvarez, *In Zimmerman Case, Self-Defense was Hard to Topple*, N.Y. TIMES (July 15, 2013), www.nytimes.com/2013/07/15/us/in-zimmerman-case-self-defense-was-hard-to-topple.html; Marc Caputo, *Juror: We talked Stand Your Ground before not-guilty Zimmerman verdict*, Miami Herald (July 17, 2013), www.miamiherald.com/news/state/florida/trayvon-martin/article1953286.html; Letter from Sanford City Manager Norton Bonaparte Jr. (Mar. 19, 2012), www.scribd.com/document/86330859/Zimmerman-Martin-Shooting.

that makes individuals of color less able to defend themselves than their white peers.³⁸² Some have even argued that these laws are an example of “the constitutive presence of racial bias in our society by the determination of whose life is valued, demonstrated through the legal consequences for taking such a life,” and help to “legalize certain forms of homicide.”³⁸³ State Parties are obligated to ensure that “the implementation of legislation does not have a discriminatory *effect*”³⁸⁴ and as clarified by the Committee on the Elimination of Racial Discrimination, “presumed victims of racial discrimination are not required to show that there was discriminatory intent against them” so long as the outcome has a discriminatory effect.³⁸⁵ There is also strong evidence of racial bias in firearm deaths by U.S. police officers. The U.S. Justice Department has acknowledged this in several recent reports finding racial bias, discrimination, and excessive use of force in police forces around the country.³⁸⁶

F. The Right to Gender Equality

Although adopted with racial discrimination in mind, the Equal Protection Clause of the Fourteenth Amendment has also come to address discrimination on the basis of sex.³⁸⁷ As is the case with racial

382. *Supra* notes 57-58 and works cited.

383. Ackermann et al., *supra* note 58.

384. This was made in reference to non-citizens, but it stands to reason that it could also apply to racial groups. Comm. on the Elimination of Racial Discrimination, General Recommendation XXX on Discrimination Against Non-citizens, ¶ 6, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004) (emphasis added).

385. Laurent Gabre Gabaroum v. France, Opinion adopted by the Committee under article 14 of the Convention concerning communication No. 52/2012, ¶ 7.2, U.N. Doc. CERD/C/89/D/52/2012 (June 8, 2016) (citing V.S. v. Slovakia, ¶ 7.4, U.N. Doc. CERD/C/88/D/56/2014 (Jan. 6, 2016)).

386. Police departments in Baltimore, Chicago, Ferguson, Missouri, and New Orleans were found by the U.S. Justice Department to have problems with racial bias and excessive use of force. *See* U.S. DEPT. JUSTICE & U.S. ATTORNEY’S OFF. NORTHERN DISTRICT OF ILLINOIS, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (Jan. 13, 2017), www.justice.gov/opa/file/925846/download; U.S. DEPT. JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf; U.S. DEPT. JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (Aug. 10, 2016), www.justice.gov/crt/file/883296/download; U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (Mar. 16, 2011), www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

387. *See* Reed v. Reed, 404 U.S. 71 (1971).

discrimination, international law is broader, not only prohibiting sex discrimination, but guaranteeing the equal and full right of men and women to the enjoyment of fundamental human rights³⁸⁸ under treaties³⁸⁹ and customary international law.³⁹⁰

As set forth above, women are *twenty-one times* more likely to be killed with a firearm in the United States than in other high-income countries, and the easy accessibility to firearms in the United States puts women at heightened risk, especially in the context of domestic violence.³⁹¹ A woman is fatally shot by a former or current romantic partner every sixteen hours in the United States.³⁹² Nearly 75% of domestic shooting deaths are the current wives and girlfriends of the shooters; fewer than 20% of fatal domestic shootings are caused by women shooting their husbands or boyfriends.³⁹³ Gaps in federal gun legislation, particularly the Lautenberg Amendment,³⁹⁴ allow many convicted abusers and stalkers to purchase firearms, and do not require convicted abusers to relinquish those already in their possession. Often, even people who *are* legally prohibited from gun ownership due to domestic violence convictions are permitted to

388. See generally Eva Brems, *Protecting the Human Rights of Women*, in INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY: PROTECTING THE HUMAN RIGHTS OF GROUPS 100 (Gene M. Lyons & James Mayall eds., 2003) (exploring various approaches in international human rights law to women's equality). For a comprehensive review of the relationship between international human rights law and gender see generally HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000). See also Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RIGHTS QUARTERLY 486 (1990).

389. See, e.g., ICCPR, *supra* note 228, arts. 2(1) & 3; CEDAW, *supra* note 230, art. 1.

390. See RESTATEMENT, *supra* note 243, § 702, comment 1. This principle is widely recognized in international instruments. See, e.g., UDHR, *supra* note 225, art. 2; Charter of the United Nations, preamble & art. 1(3), 59 Stat. 1031; TS 993; 3 Bevans 1153 (a foundational goal of the United Nations is "to reaffirm faith in . . . the equal rights of men and women."). It can also be found in all major regional human rights instruments. See Charter of the Organization of American States, chpt. II, art. 3(1), 119 U.N.T.S. 3; European Convention on Human Rights, *supra* note 243, arts. 1 & 14; American Convention, *supra* note 243, arts. 1(1) & 24; Banjul Charter, *supra* note 243, arts. 2 & 18(3); Arab Charter on Human Rights, *supra* note 243, art. 2; Charter of Fundamental Rights of the European Union, *supra* note 243, art. 21(1); ASEAN Human Rights Declaration, *supra* note 243, art. 3; American Declaration, *supra* note 243, art. II.

391. See *supra* notes 47-49 and accompanying text.

392. See Meghan Hoyer, *An Analysis of FBI Supplemental Homicide Data, Domestic shooting homicides (2006-2014)*, ASSOCIATED PRESS, <http://data.ap.org/projects/2016/domestic-gun-homicides/>.

393. *Id.*

394. See *supra* notes 115-118 and accompanying text.

purchase firearms as a result of poor oversight and weak enforcement.³⁹⁵

States have an obligation of due diligence to prevent, investigate, and punish acts of violence against women, even when perpetrated by private persons.³⁹⁶ The U.N. General Assembly declared domestic violence to be a public concern that States should prevent.³⁹⁷ This is also the view of the Inter-American Commission on Human Rights,³⁹⁸ the European Court of Human Rights,³⁹⁹ the Committee on the Elimination of Discrimination against Women,⁴⁰⁰ and the Human Rights Committee.⁴⁰¹

G. Freedom of Religion, Expression, Opinion, and Belief

Like the First Amendment of the U.S. Constitution,⁴⁰² international law protects the freedom of religion,⁴⁰³ expression, opinion, and belief.⁴⁰⁴ The

395. See Sheryl Gay Stolberg, *Domestic Abusers Are Barred From Gun Ownership, but Often Escape the Law*, N.Y. TIMES (Nov. 6, 2017), www.nytimes.com/2017/11/06/us/politics/domestic-abuse-guns-texas-air-force.html. In its last review before the Human Rights Committee, the United States was urged to “ensure strict enforcement of the Domestic Violence Offender Gun Ban of 1996 (the Lautenberg Amendment).” Human Rights Comm., Concluding Observations 2014, *supra* note 254, ¶ 10.

396. See generally Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 68-76 (1993). See also Bunch, *supra* note 388, pp. 491-92.

397. G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

398. González et al. (Campo Algodonero), *supra* note 281; Da Penha v. Brazil, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev., ¶ 704 (Apr. 16, 2001) (finding that the State’s failure to exercise due diligence to prevent and investigate a domestic violence complaint by a private actor was a violation of the State’s responsibilities).

399. Opuz v. Turkey, Application No. 33401/02, 24 Eur. Ct. H.R. (2009) (finding Turkey guilty of violating the right to life by failing to protect the applicant and her mother against domestic violence which led to the death of the applicant’s mother).

400. A.T. v. Hungary, Communication No. 2/2003, Comm. on the Elimination of Discrimination against Women, ¶¶ 9.2-9.6 (Jan. 26, 2005) (finding the State had failed to protect a woman subjected to regular and severe domestic violence against the “serious risk to her physical integrity, physical and mental health and her life.”); Comm. on the Elimination of Discrimination against Women, General Recommendation 19: Violence Against Women, ¶ 9 (1992) (“Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”).

401. Human Rights Comm., General Comment No. 36, *supra* note 318, ¶ 23 (calling on States “to take special measures of protection towards persons in situation of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence [including] . . . victims of domestic and gender-based violence.”).

402. U.S. CONST. amend. I.

403. See UDHR, *supra* note 225, arts. 2 & 18; ICCPR, *supra* note 228, art. 2(1) & 18 (protecting the

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United States has ratified treaties, notably the International Covenant on Civil and Political Rights, obligating the government to protect the enjoyment of such rights. These freedoms have been negatively affected by the proliferation of firearms in the United States.

Freedom of religion is a non-derogable right.⁴⁰⁵ It is “far-reaching and profound.”⁴⁰⁶ It must be “broadly construed,”⁴⁰⁷ and includes “the right of all persons to worship or assemble in connection with a religion or belief.”⁴⁰⁸ The General Assembly has declared that “persons belonging to minorities . . . have a right to . . . practise their own religion . . . without interference.”⁴⁰⁹ The U.N. Human Rights Council has urged States

[t]o exert the utmost efforts, in accordance with their national

“right to freedom of thought, conscience, and religion” and prohibiting discrimination on religious grounds); ICERD, *supra* note 227, art. 2(2) (declaring that States Parties must eliminate racial discrimination in the enjoyment of the right to freedom of religion); European Convention on Human Rights, *supra* note 243, arts. 9 & 14; American Convention on Human Rights, *supra* note 243, arts. 2 & 8. CRC, *supra* note 231, art. 14. *See also* G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. A/RES/36/55 (Nov. 25, 1981) (recognizing the freedom of religion as a universal human right); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 367 (2010) (recognizing the right to religion and belief as part of customary international law, *jus cogens* rights, and obligations *erga omnes*).

404. Article IV of the American Declaration and article 19 of the ICCPR protect these rights, while article 5(c)(viii) of the ICERD prohibits discrimination in the enjoyment of them. *See also* UDHR, *supra* note 225, art. 19; American Convention on Human Rights, *supra* note 243, art. 13; European Convention on Human Rights, *supra* note 243, art. 10; Banjul Charter, *supra* note 243, art. 9; CRC, *supra* note 231, art. 13. *See also* U.N. Econ. & Soc. Council, Comm. On Human Rights, *Preliminary Report by the Special Representative of the Commission on Human Rights*, U.N. Doc. E/CN.4/1985/20, ¶¶ 14-15 (1985) (stating that the freedom of thought, conscience and religion has acquired “the character of *jus cogens*.”).

405. ICCPR, *supra* note 228, art. 4 (2) (prohibiting derogations from multiple rights, including the art. 18 freedom of “thought, conscience and religion”).

406. Human Rights Comm., General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), ¶¶ 1-2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993).

407. *Id.* *See also id.* ¶ 4 (stating the freedom to manifest one’s religion encompasses “a broad range of acts.”).

408. U.N. Comm’n on Human Rights Res. 2005/40 on Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N. Doc. E/CN.4/RES/2005/40, ¶ 4(d) (Apr. 19, 2005); Human Rights Council, Res. 6/37 on Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, ¶ 9(g), U.N. Doc. A/HRC/RES/6/37 (Dec. 14, 2007); G.A. Res. 65/211, Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, ¶ 12(g) (Mar. 30, 2011).

409. G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, U.N. Doc. A/RES/47/135 (Dec. 18, 1992).

legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols *are fully respected and protected* and to take additional measures in cases where they are vulnerable to desecration or destruction.⁴¹⁰

In the past few years, mass shootings have increasingly occurred at places of worship, including at the Pittsburgh Tree of Life Synagogue in 2018, a Sutherland Springs, Texas church in 2017, the Emanuel AME Church in Charleston, South Carolina in 2015, and a Sikh temple in Wisconsin in 2012. The proliferation of firearms and easy access to guns may interfere with the right of people in the United States to exercise their religion because of their well-founded fear that they will become victims to firearm violence as a result of their religious choices.

The U.S. government has conceded that gun violence at religious buildings violates the victims' free exercise of religious belief. In 2015, the U.S. government mentioned the fatal shooting at a Kansas City Jewish community center in its discussion of discrimination based on religion and hate crimes in the Report submitted to the Human Rights Council as part of its 2015 Universal Periodic Review.⁴¹¹ Likewise, the perpetrator of the Tree of Life synagogue shooting has been charged with several counts of obstructing the free exercise of religious belief.⁴¹²

The rights to freedom of expression and opinion, considered to be preconditions for the exercise of other fundamental rights,⁴¹³ are also impacted by gun violence. Intimidation and threats of violence can

410. H.R.C. Res. 6/37, *supra* note 408, ¶ 9(e) (emphasis added).

411. Human Rights Council, Working Group on the Universal Periodic Review, United States of America, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, at 6, U.N. Doc. A/HRC/WG.6/USA/1 (Feb. 13, 2015).

412. Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 2, 2018), www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html.

413. See Compulsory Membership in an Ass'n Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the Am. Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 70 (Nov. 13 1985) (“[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests”); Human Rights Comm., General Comment No. 34: Article 19, Freedoms of opinion and expression, ¶¶ 2, 4, U.N. Doc. CCPR/C/GC/34 (2011) (the freedom of opinion and expression “constitute the foundation stone for every free and democratic society. . . . [and] form a basis for the full enjoyment of a wide range of other human rights.”).

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“strongly restrict freedom of expression”⁴¹⁴ and the Human Rights Committee has found that “the harassment [or] intimidation . . . of a person . . . for reasons of the opinions they may hold” may amount to a violation of these rights.⁴¹⁵

High levels of gun violence in the United States may cause individuals to refrain from expressing their opinions, fearing that they will be threatened or shot. In 2011, U.S. Representative Gabrielle Giffords and eighteen others were shot during a constituent meeting and in 2016, a shooter attacked a group of Republican lawmakers who were playing baseball, firing more than seventy rounds and critically injuring Congressman Steve Scalise. There are many reports of individuals threatened or shot with firearms because they expressed an opinion about issues such as protests at professional football games⁴¹⁶ or sexual orientation.⁴¹⁷ Under the International Covenant on Civil and Political Rights, the United States must “ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression.”⁴¹⁸

Just as the U.S. Constitution protects the freedom of the press,⁴¹⁹ international law recognizes that a free press is “essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights.”⁴²⁰ The Human Rights Committee has called a free and unhindered press “one of the cornerstones of a democratic society.”⁴²¹ Yet reporters and journalists in the United States have been shot and killed,

414. Inter-Am. Comm’n on Human Rights, Declaration of Principles on Freedom of Expression, Principle 9 (Oct. 2000).

415. Human Rights Comm., General Comment No. 34, *supra* note 413, ¶ 9. The Committee adds “[a]ny form of effort to coerce the holding or not holding of any opinion is prohibited.” *Id.* ¶ 10.

416. Des Bieler, *Gunshot Ends Family’s Thanksgiving Argument over NFL Protests During Anthem*, WASH. POST (Nov. 28, 2018), www.washingtonpost.com/sports/2018/11/28/gunshot-ends-family-thanksgiving-argument-over-nfl-protests-during-anthem/?noredirect=on&utm_term=.9a6b1ce08ce0.

417. *Detroit Man to Stand Trial for Hate Crime Against Transgender Woman*, ABC-DETROIT (Aug. 16, 2018), www.wxyz.com/news/detroit-man-to-stand-trial-for-hate-crime-against-transgender-woman.

418. Human Rights Comm., General Comment No. 34, *supra* note 413, ¶ 7.

419. U.S. CONST. amend. I.

420. Human Rights Comm., General Comment No. 34, *supra* note 413, ¶ 13. *See also* Inter-Am. Comm’n H.R., Declaration of Principles on Freedom of Expression, *supra* note 414, preamble (“. . . freedom of the press is essential for the full and effective exercise of freedom of expression”).

421. Human Rights Comm., General Comment No. 34, *supra* note 413, ¶ 13.

including news reporter Alison Parker and photojournalist and cameraman Adam Ward during a live television interview in May 2018, and the five people shot to death at the *Capital Gazette* newsroom in Maryland in June 2018. These events contributed to the United States being added to Reporters Without Border's list of the *top five* deadliest countries for journalists in 2018, which is calculated based on the number of journalists killed, on account of their journalistic work, within a country over the course of the year.⁴²²

H. The Right to Peaceful Assembly and Association

The First Amendment of the U.S. Constitution guarantees “the right of the people peaceably to assemble.”⁴²³ Likewise, international human rights law recognizes the right to assembly and association as fundamental human rights, protected in articles 21 and 22 of the International Covenant on Civil and Political Rights,⁴²⁴ article 20 of the Universal Declaration,⁴²⁵ and in numerous other international⁴²⁶ and regional instruments.⁴²⁷ Like the freedom of expression, the right to assembly and association are “essential components of democracy” and “serve as a vehicle for the exercise of many other civil, cultural, economic, political and social rights.”⁴²⁸ However, gun violence and the proliferation of firearms discourage individuals from exercising these rights and may enable violations if they do.

422. REPORTERS WITHOUT BORDERS, WORLDWIDE ROUND-UP OF JOURNALISTS KILLED, DETAINED, HELD HOSTAGE, OR MISSING IN 2018 10 (2018), https://rsf.org/sites/default/files/worldwide_round-up.pdf.

423. U.S. CONST. amend. I.

424. ICCPR, *supra* note 228.

425. UDHR, *supra* note 225, art. 20.

426. *See, e.g.*, ICERD, *supra* note 227, art. 5(d)(ix) (prohibiting discrimination in the enjoyment of the “right to freedom of peaceful assembly and association”); ICESCR, *supra* note 232, art. 8; CEDAW, *supra* note 230, art. 7(c). *See also* U.N. Human Rights Council, Resolution 15/21, U.N. Doc. A/HRC/RES/15/21 (Oct. 6, 2010) (“everyone has the rights to freedom of peaceful assembly and of association”).

427. European Convention on Human Rights, *supra* note 243, art. 11; American Convention on Human Rights, *supra* note 243, art. 15; Banjul Charter, *supra* note 243, arts. 10 & 11; Arab Charter on Human Rights, *supra* note 243, art. 28; Charter of Fundamental Rights of the European Union, *supra* note 243, art. 12; ASEAN Human Rights Declaration, *supra* note 243, art. 24 (peaceful assembly).

428. Maina Kiai (Special Rapporteur on the Rights to Freedom of Assembly and Association), *Rep. on the Rights to Freedom and Assembly & Assoc.*, ¶ 12, U.N. Doc. A/HRC/20/27 (May 21, 2012).

The U.N. Special Rapporteur on the Rights to Freedom of Assembly and Association has defined an assembly as “an intentional and temporary gathering in a private or public space for a specific purpose,”⁴²⁹ which includes rallies, demonstrations, and protests. Likewise, the Human Rights Committee’s new draft General Comment No. 37 defines assembly as “more than one person gathered at the same time, in a publicly accessible place, with the purpose of expressing themselves collectively” but clarifies that “[e]xpression need not be the only or even the main goal.”⁴³⁰ The draft comment notes that all peaceful gatherings “are protected . . . whether they are stationary, such as pickets, or moving, such as processions or marches.”⁴³¹ While only *peaceful* assemblies are protected, “[e]ven if a particular assembly ceases to be peaceful, those involved retain all their other rights under the Covenant, such as the right to life.”⁴³²

The Special Rapporteur’s report explains that “the enjoyment of the right to hold and participate in peaceful assemblies entails the fulfilment by the State of its positive obligation to facilitate the exercise of this right.”⁴³³ It further notes that States must “*actively* protect” peaceful assemblies.⁴³⁴ The Human Rights Committee’s new draft Comment No. 37 explains that “[t]he obligation of accommodation also means that States parties and their agents must facilitate and create an enabling environment for the exercise of assembly rights.”⁴³⁵ The State’s “general obligation . . . is to protect demonstrators from external threats”⁴³⁶ and includes “providing protection to participants against possible abuses by non-State actors.”⁴³⁷

I. Special Protection for Children and the Right to Education

Although the U.S. Constitution is silent regarding the rights of children

429. *Id.*

430. Human Rights Comm., Draft General Comment No. 37, Article 21: right of peaceful assembly (Draft prepared by the Rapporteur, Christof Heyns), ¶ 14 (2019) (internal citations omitted).

431. *Id.* ¶ 5.

432. *Id.*

433. Kiai, *Rep. on the Rights to Freedom and Assembly & Assoc.*, *supra* note 428, ¶ 27.

434. *Id.* ¶ 33 (emphasis added).

435. Human Rights Comm., Draft General Comment No. 37, *supra* note 430, ¶ 28.

436. *Id.* ¶ 52.

437. *Id.* ¶ 28.

and the right to an education, U.S. federal and state laws protect both in many ways.⁴³⁸ This is true for international law as well.⁴³⁹ The International Covenant on Civil and Political Rights requires special protection for children on account of their status as minors,⁴⁴⁰ and the Preamble of the WHO's Constitution states that "[h]ealthy development of the child is of basic importance."⁴⁴¹ Protection of children and their right to an education is also found in the Geneva Conventions,⁴⁴² the Rome Statute of the International Criminal Court,⁴⁴³ the Convention on the Rights of the Child,⁴⁴⁴ the International Covenant on Economic, Social and Cultural Rights,⁴⁴⁵ and customary international law.⁴⁴⁶ Yet children – and

438. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting persons from being sentenced to death for crimes committed when they were under the age of eighteen).

439. See LOUIS HENKIN ET AL., *HUMAN RIGHTS* 260-276 (2d. ed. 2009); G. VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* (1995). For background on the historical development of children's rights and its incorporation into modern international law, see generally Stephen R. Arnott, *Family Law: Autonomy, Standing, and Children's Rights*, 33 WILLIAM MITCHELL L. R. 809 (2007). See also U.N. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); UDHR, *supra* note 225, art. 25(2); ICESCR, *supra* note 232, arts. 10 & 12; European Convention on Human Rights, *supra* note 243, art. 6(1) and Protocol No. 7, art. 5; Banjul Charter, *supra* note 243, art. 18(3); and American Convention, *supra* note 243, art. 19.

440. ICCPR, *supra* note 228, art. 24.

441. WHO Constitution, *supra* note 233, preamble. See also *id.* art. 2(1).

442. E.g., Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 77, 12 Aug. 1949, 75 UNTS 287 ("children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.").

443. Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF.183/9 (July 17, 1998). For example, the Rome Statute has child-specific provisions against the enlistment, conscription, and use of child soldiers, arts. 8(2)(b)(xxvi), 8(2)(e)(vii), 6(e), 7(1)(c), 7(2)(c), as well as provisions against attacks against educational buildings, art. 8(2)(b)(ix) and 8(2)(e)(iv).

444. The preamble to the Convention on the Rights of the Child – which the United States is the only eligible country not to be party to – states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection...." CRC, *supra* note 231, preamble.

445. ICESCR, *supra* note 232, arts. 10, 13.

446. See Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37, 44 (1994) ("[t]he right to education and the right to enjoy it without discrimination are examples of economic, social and cultural rights that should be considered part of customary international law"); *World Declaration on Education for All*, adopted at the World Education Forum, Dakar (2002) (reaffirming that education is a fundamental right of all people throughout the world.). See also Hannum, *supra* note 245, at 349 ("the right to free primary education . . . would seem to enjoy sufficiently widespread support as to be at least [a] potential candidate[] for rights recognized under customary international law"); *id.* n 256 (".

their safety at school – are constantly threatened by gun violence in the United States.⁴⁴⁷

The failure to protect children impacts their ability to receive an education. The realization of this right is the responsibility of national governments.⁴⁴⁸ Although it is not included in the U.S. Constitution,⁴⁴⁹ all fifty state constitutions mandate public education,⁴⁵⁰ and the right to an education has increasingly been recognized as a fundamental right.⁴⁵¹ The right to an education was one of President Franklin D. Roosevelt’s proposals for a “Second Bill of Rights” prior to his death.⁴⁵² Under international law, the right to an education is a universal right protected by article 26(1) of the Universal Declaration of Human Rights, as well as

. . . the right to at least primary education (and the concomitant obligation on a state to provide such education) seems to be universally accepted in the practice of states”); Courtney Jung et al., *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1053 (2014) (“The right to education is the most widely enshrined [socio-economic right], present in more than three-quarters of the world’s constitutions.”). See generally Fons Coomans, *Content and Scope of the Right to Education as a Human Right and Obstacles to Its Realization*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 183-229 (Yvonne Donders & Vladimir Volodin, eds., 2007).

447. See *supra* notes 29-37, 69-73, 75-82, 131-136 and accompanying text.

448. See UNESCO, THE DAKAR FRAMEWORK FOR ACTION: EDUCATION FOR ALL 26-28 (2000). Although the U.S. federal government has stopped short of recognizing education as a fundamental right, the U.S. Supreme Court stated in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954), that “education is perhaps the most important function of state and local governments.”

449. In 1973, the U.S. Supreme Court held in a 5-4 decision that the right to an education is non-fundamental. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973) (“education is not among the rights adored explicit protection under our federal constitution. Nor do we find any basis for saying it is implicitly so protected.”). But see Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. CHI. L.J. 111, 121-23 (2004) (arguing that *Rodriguez* was wrongly decided); Sarah G. Boyce, Note, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government’s Quest to Leave No Child Behind*, 61 DUKE L. J. 1025 (2012) (arguing that it is not improbable for the federal government to recognize a fundamental right to education given their increased role in education since *Rodriguez*).

450. See Education Commission of the States, *50-State Review* (Mar. 2016), www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

451. See generally Trish Brennan-Gac, *Educational Rights in the States*, 40 ABA HUMAN RIGHTS MAGAZINE (Sept. 26, 2018), www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_n_o_2_civil_rights/educational_rights_states/. See e.g., Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Towards Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343 (2010); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1712-16 (2007).

452. Sunstein & Barnett, *supra* note 348.

several international⁴⁵³ and regional instruments⁴⁵⁴ and customary international law.⁴⁵⁵ Education is to be provided “in an appropriate environment and in the conditions necessary to ensure [children’s] full intellectual development.”⁴⁵⁶

As noted earlier in Part I, there is an average of one school shooting every week in the United States.⁴⁵⁷ These shootings target and victimize a population that is particularly vulnerable. Until a certain age, children are required to attend school by law,⁴⁵⁸ and shootings have repeatedly occurred in public schools operated by the State. This imposes a particular obligation upon States, which are required to protect those in their custody or under their control.⁴⁵⁹

J. The Right to Participate in the Cultural Life of the Community

The right to participate in the cultural life of the community is well-established as a principle of general international law.⁴⁶⁰ Article 27 of the Universal Declaration of Human Rights provides that “everyone has the

453. Specifically, the right to an education is enshrined in multiple treaties that the United States has signed but not ratified, but which are widely ratified by other countries, including CEDAW, *supra* note 230, art. 10; ICESCR, *supra* note 232, art. 13; CRC, *supra* note 231, art. 28. The United States has signed ICERD, which prohibits racial discrimination in the enjoyment of the right to education. ICERD, *supra* note 227, art. 5(e)(v).

454. See American Declaration, *supra* note 243, art. XII; ASEAN Human Rights Declaration, *supra* note 243, art. 31(1); Charter of Fundamental Rights of the European Union, *supra* note 243, art. 14(1); European Convention on Human Rights, *supra* note 243, art. 2; OAS Charter, *supra* note 243, art. 49; Arab Charter on Human Rights, *supra* note 243, art. 34; Banjul Charter, *supra* note 243, art. 17(1).

455. See *supra* note 446.

456. *Yean and Bosico Girls v. The Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 185 (Sept. 8, 2005) (emphasis added) (finding that the Dominican Republic violated the rights of the victim to special protection on account of her status as a child and the obligation of the State to ensure progressive development by obstructing her opportunity to attend day school with children her age, thereby forcing her to attend night classes with individuals over the age of 18).

457. *Supra* note 23. See also *supra* note 24 and accompanying text.

458. See Daniel, *supra* note 80, at 613 (“The legislatures of all 50 states have enacted compulsory education laws, the violation of which may bring criminal penalties to students’ parents or guardians”).

459. See *supra* notes 318-329 and accompanying text.

460. Regarding the development of the international right to culture and right to take part in cultural life, see generally Yvonne Dunders, *The Legal Framework of the Right to Take Part in Cultural Life*, in HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE: LEGAL DEVELOPMENTS AND CHALLENGES 231-272 (Yvonne Donders & Vladimir Volodin, eds., 2007).

right to freely participate in the cultural life of the community.”⁴⁶¹ This right is also found in international treaties⁴⁶² and regional human rights instruments, including the American Declaration of the Rights and Duties of Man.⁴⁶³ Article 27 of the International Covenant on Civil and Political Rights protects the rights of minorities “to enjoy their own culture.”⁴⁶⁴ Article 5(e)(vi) of the International Convention on the Elimination of All Forms of Racial Discrimination protects the right to equal participation in cultural activities.⁴⁶⁵ The right to participate in the cultural life of the community and to cultural heritage is also protected by the Geneva Conventions and Additional Protocols,⁴⁶⁶ the 1954 Hague Convention,⁴⁶⁷ and the Rome Statute of the International Criminal Court.⁴⁶⁸

The Committee on Economic, Social and Cultural Rights has noted that “[t]he full promotion of and respect for cultural rights is essential for the maintenance of human dignity”⁴⁶⁹ and that the right to participate in cultural life is “intrinsically linked to the right to education . . . [and] to the enjoyment of other rights recognized in the international human rights instruments.”⁴⁷⁰ Culture is widely defined under international law and includes “music and song, . . . religion or belief systems, rites and ceremonies, sport and games, . . . food” and much more. States must take

461. UDHR, *supra* note 225, art. 27(1).

462. See ICESCR, *supra* note 232, art. 15(1)(a); CEDAW, *supra* note 230, art. 13(c); CRC, *supra* note 231, art. 31(2); International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities art. 30(1), G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008.

463. See American Declaration, *supra* note 243, art. XIII; ASEAN, *supra* note 243, art. 32; Arab Charter on Human Rights, *supra* note 243, art. 36; Banjul Charter, *supra* note 243, art. 17(2).

464. ICCPR, *supra* note 228, art. 27.

465. ICERD, *supra* note 227, art. 5(e)(vi).

466. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 53 (protecting “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples”).

467. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 U.N.T.S. (1954).

468. Rome Statute, *supra* note 443, art. 8(2) (classifying the destruction of cultural heritage as a war crime).

469. Comm. on Economic, Social and Cultural Rights, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/21, ¶ 1 (Dec. 21, 2009).

470. *Id.* ¶¶ 2, 17.

“positive action” to ensure “preconditions for participation”⁴⁷¹ and “to prevent third parties from interfering in the right. . . .”⁴⁷²

As former U.N. High Commissioner for Human Rights, Prince Zeid Ra’ad al-Hussein said, “[f]irearms-related violence and insecurity . . . pose direct risks to . . . the right to participate in cultural life.”⁴⁷³ The climate of fear that pervades American society, particularly in the wake of mass shootings, affects the enjoyment of this right. Shootings have occurred in places of cultural significance, including concerts, art festivals, sports events, theaters, and places of worship, as well as in bars, restaurants, and night-clubs.

VI. INTERNATIONAL AND DOMESTIC REMEDIES FOR HUMAN RIGHTS WRONGS

A. International Reaction to the U.S. Gun Violence Crisis

In Part V, we identified ten categories of human rights that are frustrated, impaired, or destroyed by gun violence in the United States. These rights are intersectional and six have parallel rights in the U.S. Constitution. It is unsurprising, given the scale and magnitude of the harm, that multiple international human rights treaty bodies and other international mechanisms have begun to focus upon the problem of gun violence in the United States.⁴⁷⁴

In 2015, the U.N. Human Rights Council recommended that the U.S. government “[a]dopt legislation expanding the verification of personal backgrounds for all acquisitions of firearms” and “[c]onsider the adoption of legislation to enhance the verification of the records for all fire arms transfers.”⁴⁷⁵ In 2016, the U.N. High Commissioner for Human Rights stated that:

471. *Id.* ¶ 6.

472. *Id.* ¶ 48.

473. Rep. of OHCHR 2016, *supra* note 8, ¶ 52.

474. *See supra* note 254. *See also* Human Rights Council, Principles on the Prevention of Human Rights Violations Committed with Small Arms, U.N. Doc. A/HRC/Sub.1/58/L.11/Add.1 (Aug. 24, 2006).

475. HRC, 2015 Report of the Working Group on the UPR, United States of America, *supra* note 254, at 27-28.

[i]t is hard to find a rational justification that explains the ease with which people can buy firearms, including assault rifles, in spite of prior criminal backgrounds, drug use, histories of domestic violence and mental illness, or direct contact with extremists – both domestic and foreign. . . . How many more mass killings of school-children, of co-workers, of African-American churchgoers . . . will it take before the United States adopts robust gun regulation?⁴⁷⁶

In February 2018, the Inter-American Commission on Human Rights held a hearing on the “Regulation of Gun Sales and Social Violence in the United States.”⁴⁷⁷ The Human Rights Committee plans to take up the issue of U.S. gun violence again during the course of the United States’ next periodic review in 2020 and in March 2019 requested information from the U.S. government “on the number of victims of gun violence, including in the context of domestic violence . . . efforts made by the State party to restrict access to firearms for those most at risk of abusing them, and the steps taken to counter patterns of abuse.”⁴⁷⁸ The Committee will also consider the “excessive use of force by law enforcement officials against civilians, particularly those belonging to racial minorities . . . the mechanisms in place to hold law enforcement officials who use excessive force accountable [including] in cases of firearm use,” and laws regulating “the appropriate use of force and firearms by law enforcement and security forces.”⁴⁷⁹

In addition to focusing upon gun violence generally, some human rights bodies have addressed gun violence with respect to specific rights.

476. *In Wake of Mass Shooting, UN Rights Chief Urges US to Consider Robust Gun Control*, UN NEWS (June 14, 2016), news.un.org/en/story/2016/06/532022-wake-mass-shooting-un-rights-chief-urges-us-consider-robust-gun-control.

477. Hearing on “Regulation of Gun Sales and Social Violence in the United States,” Inter-American Commission on Human Rights, 167th Extraordinary Period of Sessions (Feb. 27, 2018), <http://7gxsl10eqdj9anbalk3swtoo-wpengine.netdna-ssl.com/wp-content/uploads/2018/10/InterAmericanCommissionHearingFebruary272018FINAL.pdf>.

478. The Human Rights Committee issued its List of Issues for the United States to answer in its fifth periodic report to the Committee. Human Rights Comm., List of issues prior to submission of the fifth periodic report of the United States of America, ¶ 14, U.N. Doc. CCPR/C/USA/QPR/5 (Apr. 18, 2019).

479. *Id.* See also Harris Institute Submission to the Human Rights Committee, *supra* note 10.

Regarding the *right to health*, the World Health Organization has concluded that gun violence is largely preventable⁴⁸⁰ and encouraged countries to make “efforts to reduce the promotion and use and availability of firearms . . . with increased industry regulation to prevent criminals accessing weapons and to protect children from the ill-effects of firearms availability.”⁴⁸¹

In terms of protecting *women and children*, the Human Rights Committee has observed that States Parties should take “every possible economic and social measure . . . to prevent [children] from being subjected to acts of violence.”⁴⁸² Likewise, the Committee on the Rights of the Child has urged States “to take all necessary measures to ensure that children [do] not have access to small arms”⁴⁸³ The Human Rights Committee appealed directly to the United States for more “stringent” legislation to limit the easy availability of firearms in 1995⁴⁸⁴ and in 2014 it expressed further concern “at the continuing high numbers of gun-related deaths and injuries and the disparate impact of gun violence on minorities, women and children. . . .”⁴⁸⁵ During its 2014 review, one Committee member noted “the lack of a preventive approach to domestic violence, [and] regretted that a man who was under a restraining order had been able to legally access a firearm which he had then used to kill his children.”⁴⁸⁶ The Committee recommended that the U.S. government pursue “legislation requiring background checks for all private firearm transfers . . . and ensure strict enforcement of the Domestic Violence

480. WORLD HEALTH ORGANIZATION, SMALL ARMS AND GLOBAL HEALTH (2001), http://apps.who.int/iris/bitstream/handle/10665/66838/WHO_NMH_VIP_01.1.pdf?sequence=1. See also WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 28 (2002), www.who.int/violence_injury_prevention/violence/world_report/en/summary_en.pdf.

481. WHO, SMALL ARMS AND GLOBAL HEALTH, *supra* note 480, at 20.

482. Human Rights Comm., General Comment No. 17: Article 24 (Thirty-fifth session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 23, ¶ 4 (1994).

483. Comm. on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 8 of The Optional Protocol to the Convention on The Rights of the Child on The Involvement of Children in Armed Conflicts – Concluding Observations: Bangladesh, U.N. Doc. CRC/C/OPAC/BGD/CO/1, ¶ 24 (Mar. 17, 2006).

484. Human Rights Comm., Concluding Observations 1995, *supra* note 254, ¶ 17.

485. Human Rights Comm., Concluding Observations 2014, *supra* note 254, ¶ 10.

486. See Human Rights Comm., Summary record of 3045th meeting, Consideration of reports submitted by States parties under article 40 of the Covenant (continued) – Fourth periodic report of the United States of America (continued), U.N. Doc. CCPR/C/SR.3045, ¶ 15 (June 11, 2014).

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Offender Gun Ban of 1996 (the Lautenberg Amendment).⁴⁸⁷ In General Comment No. 28, the Human Rights Committee observed that States should take steps towards “the removal of obstacles . . . and the adjustment of domestic legislation” so as to give effect to women’s equal enjoyment of rights.⁴⁸⁸ As explained by the Committee on the Elimination of Discrimination against Women, the State’s duty includes ensuring that there is no direct *or indirect* discrimination against women enabled by its laws.⁴⁸⁹ Speaking directly to U.S. gun violence, Ms. Rashida Manjoo, then U.N. Special Rapporteur on Violence against Women, its Causes and Consequences, has advised the United States to:

Enhance gun control measures, by ensuring an adequate background check system . . . [which should] . . . be revisited periodically to determine continued suitability. States should have clear gun removal policies when intervening in domestic violence cases [and] [g]un dealers should be penalized for illegally selling guns and also for failure to report stolen guns which are subsequently used to commit crimes.⁴⁹⁰

The *racially discriminatory aspect of U.S. gun violence* has also been an area of concern for human rights bodies. In 2014, both the Committee on the Elimination of Racial Discrimination and the Human Rights Committee expressed concern “at the high number of gun-related deaths and injuries which disproportionately affect members of racial and ethnic

487. Human Rights Comm., Concluding Observations 2014, *supra* note 254, ¶ 10(a).

488. Human Rights Comm., General Comment No. 28: Equality of Rights Between Men and Women (Art. 3), ¶ 3, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

489. Comm. on the Elimination of Discrimination against Women, General Recommendation 25: on Article 4, Paragraph 1, on Temporary Special Measures, ¶ 7 (2004) (“States parties’ obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres.”).

490. Human Rights Council, Report of Ms. Rashida Manjoo (Special Rapporteur on Violence against Women, its Causes and Consequences), ¶ 115.A(g), U.N. Doc. A/HRC/17/26/Add.5 (June 6, 2011). The current U.N. Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Dubravka Šimonović, advises States to “duly take into account possession of or access to firearms by perpetrators” of violence. Human Rights Council, Dubravka Šimonović (Special Rapporteur on Violence against Women, its Causes and Consequences), Rep. on Violence Against Women, Its Causes and Consequences, U.N. Doc. A/HRC/35/30, ¶ 103 (June 13, 2017).

minorities, particularly African Americans.”⁴⁹¹ This disparity was also raised at the U.N. Human Rights Council’s 2015 Universal Periodic Review of the United States,⁴⁹² in which the Report from the U.S. government mentioned the shooting of Michael Brown in reference to “profiling and excessive use of force by law enforcement.”⁴⁹³ The Human Rights Committee has noted that under the International Covenant on Civil and Political Rights, the principle of non-discrimination requires countries to “take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.”⁴⁹⁴ It has also called on the United States to “[r]eview the Stand Your Ground laws to remove far-reaching immunity and ensure strict adherence to the principles of necessity and proportionality when using deadly force in self-defence.”⁴⁹⁵ The Committee on the Elimination of Racial Discrimination has made similar suggestions.⁴⁹⁶

Many human rights bodies have also been critical of *excessive force used by police officers* in the United States. In 2001 the Committee on the Elimination of Racial Discrimination recommended that the U.S. government “take immediate and effective measures to ensure the appropriate training of the police force with a view to combating prejudices which may lead to racial discrimination and ultimately to a

491. CERD, Concluding Observations 2014, *supra* note 254. See Human Rights Comm., Concluding Observations 2014, *supra* note 254, ¶ 10(b) (concluding that U.S. gun violence has a “disparate impact” on minority groups.). Numerous submissions by NGOs during the 2014 review of the United States by the CERD discussed gun violence. See, e.g., Arthur R. Kamm, Violence Policy Center & Amnesty International, *African-American Gun Violence Victimization in the United States – Response to the Periodic Report of the United States to the UN Committee on the Elimination of Racial Discrimination* (June 30, 2014), tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17803_E.pdf; Amnesty International, *United States – A Submission to the UN Committee on the Elimination of Racial Discrimination*, at 11-12, AMR 51/043/2014 (July 24, 2014), www.amnestyusa.org/pdfs/CERD_Shadow2014.pdf.

492. HRC, Report of the Working Group on the UPR, United States of America, *supra* note 254, at 27.

493. Human Rights Council, Working Group on the Universal Periodic Review, United States of America, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, at 5, U.N. Doc. A/HRC/WG.6/USA/1 (Feb. 13, 2015).

494. Human Rights Comm., General Comment No. 18, *supra* note 378, ¶ 10 (emphasis added). Under the Convention on the Elimination of Racial Discrimination, the United States must review and amend or nullify laws that have a discriminatory effect ICERD, *supra* note 227, art. 2(c).

495. Human Rights Comm., Concluding Observations 2014, *supra* note 254, ¶ 10(b).

496. CERD, Concluding Observations 2014, *supra* note 254, ¶ 16.

violation of the right to security of person.”⁴⁹⁷ In 2006, the Committee against Torture criticized the “use of excessive force by [U.S.] law-enforcement personnel” and called for these incidents to be “independently, promptly and thoroughly investigated” and for perpetrators to be “prosecuted and appropriately punished.”⁴⁹⁸ More recently, in 2014, the Human Rights Committee expressed concern at the “high number of fatal shootings by certain police forces” and called on the United States to “[s]tep up its efforts to prevent the excessive use of force by law enforcement officers by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”⁴⁹⁹ This recommendation was echoed by the U.N. Working Group of Experts on People of African Descent⁵⁰⁰ and the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁵⁰¹

As regards *ill-treatment*, although the Committee against Torture has not taken up the question of the Convention against Torture’s application to gun violence, it has found as a general matter that States Parties have a duty “to afford everyone protection through legislative and other measures as may be necessary against [acts of ill-treatment] . . . whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.”⁵⁰² The European Court of Human Rights has used this reasoning to hold States accountable for failing to prevent parental corporal punishment,⁵⁰³ the Committee against Torture has applied it to the destruction of a Romani settlement by a mob of civilians,⁵⁰⁴ and the

497. Comm. on the Elimination of Racial Discrimination, Concluding Observations of the Combined First, Second and Third Reports of the United States of America, ¶ 15, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001).

498. Comm. against Torture, Concluding Observations on the Second Report of the United States of America, ¶ 37, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

499. Human Rights Comm., Concluding Observations 2014, *supra* note 254, ¶ 11.

500. Human Rights Council, Report of the Working Group of Experts on People of African Descent on its mission to the United States of America, ¶ 100, U.N. Doc. A/HRC/33/61/Add.2 (Aug. 18, 2016).

501. Econ. & Social Council, Commission on Human Rights, Report of Mr. Bacre Waly Ndiaye (Special Rapporteur on extrajudicial, summary or arbitrary executions) – Mission to the United States of America, ¶ 130, E/CN.4/1998/68/Add.3 (Jan. 22, 1998).

502. Comm. against Torture, General Comment No. 3, Implementation of article 14 by States Parties, ¶ 2, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012).

503. *See* A. v. United Kingdom, Eur. Ct. H.R., *supra* note 281; Z v. United Kingdom, Eur. Ct. H.R., *supra* note 286.

504. *See* Hajrizi Dzemajl et al. v. Yugoslavia, *supra* note 271. In its analysis of State responsibility for private acts, the Committee against Torture took into consideration that members of the police

Human Rights Committee has found it prohibits customary practices such as genital mutilation.⁵⁰⁵ The Committee against Torture makes clear that the obligation to prevent torture and ill-treatment, like other human rights, is expansive and must be implemented in various ways, including legislation, regulation, and effective enforcement.⁵⁰⁶

B. Implementing Human Rights Norms in the United States

As noted above, international human rights bodies can and have made recommendations related to reducing gun violence and the associated human rights implications. While these actions are important in and of themselves, as they require the U.S. government to respond in international fora to the concerns of the global human rights community, they cannot change U.S. policy directly. Moreover, the current U.S. administration is extraordinarily dismissive of the United Nations and international entities generally, and is likely to be relatively impervious to international pressure.⁵⁰⁷ Since the election of Donald Trump, the United States has refused, on occasion, to appear before the Inter-American Commission on Human Rights,⁵⁰⁸ withdrawn from the U.N. Human Rights Council,⁵⁰⁹ been without a U.N. ambassador for several months,⁵¹⁰ withdrawn from UNESCO,⁵¹¹ and declined to re-appoint Professor Gay McDougall, or nominate a successor, to serve on the United Nations Committee on the Elimination of Racial Discrimination,⁵¹² and did not

were in a position to intervene, but neglected to do so. *Id.*

505. Human Rights Comm., Concluding Comments on Sudan, ¶ 10, U.N. Doc. CCPR/C.79/Add.85 (1997); Human Rights Comm., Concluding Comments on Senegal, ¶ 12, U.N. Doc. CCPR/C/79/Add.82 (1997).

506. See CAT, General Comment No. 2, *supra* note 269, ¶¶ 2-3.

507. See Leila N. Sadat, *Whither Human Rights in the Era of Trump*, 35 NETHERLANDS Q. HUM. RTS 2 (2017).

508. See, e.g., *U.S. Pulls out of Human Rights Panel on Trump Executive Orders*, REUTERS (Mar. 21, 2017, 5:51PM), www.reuters.com/article/us-usa-rights-oas-idUSKBN16S2YP.

509. See Harris, *supra* note 253 (with this move, the United States joined Iran, North Korea, and Somalia as the only countries that refuse to participate in Council meetings and deliberations).

510. See Rick Gladstone, *America's U.N. Ambassador Post Is Empty. Is That a Problem?*, N.Y. TIMES (Feb. 19, 2019), www.nytimes.com/2019/02/19/world/americas/us-un-ambassador-empty.html.

511. U.S. Dept. of State, Press Release: The United States Withdraws From UNESCO (Oct. 12, 2017) (U.S. withdrawal took effect December 31, 2018).

512. Nahal Toosi, *Trump Passes on Making U.N. Racism Committee Nomination*, POLITICO (Apr. 12, 2019, 3:38PM), www.politico.com/story/2019/04/12/trump-un-committee-1272422.

nominate a candidate to the U.N. Human Rights Committee after Professor Sarah Cleveland's term expired in 2018. More recently, U.S. Secretary of State Mike Pompeo announced the formation of a "Commission on Unalienable Rights," which seeks to redefine human rights based on "natural law" and the ideas of the Founding Fathers in 1776.⁵¹³

At the same time, administrations can and do change, and there is a long history of the United States upholding human rights around the world. Moreover, and perhaps regardless of who occupies the country's highest office, human rights norms nonetheless interact with U.S. law and influence domestic jurisprudence in less formal ways. In 1996, Professor Hurst Hunnum found that "the Universal Declaration of Human Rights has perhaps been referred to more frequently by U.S. courts than by courts in any other jurisdiction."⁵¹⁴ The U.S. government has also cited the Universal Declaration as evidence of the scope of the country's international legal obligations.⁵¹⁵ Indeed, "critics often overlook efforts increasingly made to find ways to give effect to international human rights treaty obligations and norms at the sub-national (state and local) level."⁵¹⁶ There is an ongoing transnational dialogue between U.S. courts and international and foreign courts, and courts will often absorb, even if they do not directly reference, the reasoning of other courts, tribunals, or legal

513. See Roger Cohen, *Trump's Ominous Attempt to Redefine Human Rights*, N.Y. TIMES (July 12, 2019), www.nytimes.com/2019/07/12/opinion/trump-pompeo-human-rights.html. This move has been heavily criticized. See, e.g., Human Rights First, Letter to Secretary Pompeo (July 23, 2019), www.documentcloud.org/documents/6209816-Unalienable-Rights-Commission-NGO-Ltr.html (calling on the Commission to be disbanded, signed by 179 organizations and 251 former senior government officials, faith-based leaders, scholars and educators, and advocates); Letter to Secretary Pompeo (July 23, 2019), www.documentcloud.org/documents/6209799-Unalienable-Rights-Commission-Letter.html (letter expressing deep concern about the Commission and its leadership signed by 22 senators); see Michael K. Lavers, *Opposition to State Department Human Rights Advisory Commission Grows*, WASHINGTON BLADE (July 23, 2019), www.washingtonblade.com/2019/07/23/opposition-to-state-department-human-rights-advisory-commission-grows/ (a copy of a letter from Catholic theologians, signed by more than 110 people, calling for the "immediate dismantling of this commission.").

514. Hunnum, *supra* note 245, at 304.

515. Memorandum of the United States as Amicus Curiae at 9, *Filártiga v. Peña-Irala*, 630 F.2d 876 (No. 79-6090) (2d Cir. 1980).

516. David P. Stewart, *Incorporating International Human Rights Law into U.S. Law*, 38 HUM. RTS. L.J. 1, 1 (2018).

entities.⁵¹⁷ While the findings of international human rights bodies and courts are not formally binding, international opinion may nonetheless be influential, and these decisions have the potential to influence domestic policy and U.S. courts,⁵¹⁸ as we have seen before.⁵¹⁹

The case of the juvenile death penalty is instructive.⁵²⁰ In 1987, the Inter-American Commission on Human Rights found that the United States was in violation of international human rights law by permitting the executions of two individuals sentenced to death for crimes committed under the age of eighteen.⁵²¹ The Commission held that the U.S. government violated the right to life and the right to equality before the law by executing the defendants for crimes they committed as juveniles.⁵²² The Commission found that “in the member States of the [Organization of American States] there is recognized a norm of *jus cogens* which prohibits the State execution of children” and that there was an emerging international norm “establishing 18 to be the minimum age for imposition of the death penalty.”⁵²³ The Commission considered the increasing number of States which had ratified human rights treaties outlawing the execution of juveniles, as well as foreign legislation which prohibited it.⁵²⁴ It also referenced provisions of U.S. law indicating acceptance of this international norm, including the fact that twenty-two states had either abolished the death penalty for offenders under the age of eighteen, or abolished it entirely.⁵²⁵

517. See, e.g., Melissa Waters, *International Law as an Interpretive Tool, 1945–2000*, in THE U.S. SUPREME COURT AND INTERNATIONAL LAW: CONTINUITY OR CHANGE? 380 (David L. Sloss et al. eds., 2011); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

518. See, e.g., *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (citing the Human Rights Committee’s views as persuasive in interpreting an ambiguous provision of a treaty).

519. See generally MARTHA F. DAVIS, JOHANNA KALB & RISA E. KAUFMAN, *HUMAN RIGHTS ADVOCACY IN THE UNITED STATES* (2014); HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018); Koh, *supra* note 517; Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004).

520. See generally Richard J. Wilson, *The United States’ Position on the Death Penalty in the Inter-American Human Rights System*, 42 SANTA CLARA L. REV. 1159 (2002).

521. *Roach & Pinkerton v. United States*, Case 9647, Inter-Am. Comm’n H.R., Resolution No. 3/87 (1987).

522. *Id.* ¶¶ 60, 64–65.

523. *Id.* ¶¶ 56, 60.

524. *Id.*

525. *Id.* ¶ 62.

Courts in the United States seemed to take note of the Commission's decision and changed course. In 1988, the Supreme Court prohibited the execution of a fifteen-year-old offender in *Thompson v. Oklahoma*,⁵²⁶ with Justice Stevens noting "the relevance of the views of the international community in determining whether a punishment is cruel and unusual."⁵²⁷ In 2005, the juvenile death penalty was struck down *in toto* in *Roper v. Simmons*,⁵²⁸ bringing the United States into conformity with international law and practice.⁵²⁹ In *Roper*, Justice Kennedy held that the execution of a person who was under eighteen at the time of his crime violated the prohibition of cruel and unusual punishment found in the Eighth Amendment.⁵³⁰ In reaching this conclusion, Justice Kennedy found that "standards of decency" had so evolved that executing minors was now clearly prohibited as cruel and unusual. In addition to considering a consensus against the juvenile death penalty among U.S. states, Justice Kennedy noted the "overwhelming" international opinion against executing minors, looking at the laws and practices of other countries and determining that the United States stood alone in the world in regards to allowing the execution of juvenile offenders at the time.⁵³¹ He also consulted international law, noting that the United States and Somalia were the only States not to have ratified the U.N. Convention on the Rights of the Child, which expressly prohibited the death penalty for crimes committed by minors. Some judges and scholars criticized Justice Kennedy's use of foreign law,⁵³² particularly Justice Scalia, who wrote

526. 487 U.S. 815 (1988).

527. *Id.* at 831 n.31. Justice O'Connor agreed with this approach in her concurring opinion. *But see* *Stanford v. Kentucky*, 492 U.S. 361, 369 n. 1 (1989) (Justice Scalia writes that "it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant.").

528. 543 U.S. 551 (2005).

529. *See* Corina Gerety, *The Status of the Prohibition on the Imposition of the Death Penalty on Juvenile Offenders Under International Law*, in *INTERNATIONAL CRIME AND PUNISHMENT: SELECTED ISSUES, VOLUME 2*, 129 (SIENHO YEE ED., 2004).

530. *Roper*, 543 U.S. at 604-605.

531. Kennedy noted that between 1990 and *Roper*, only seven countries had executing juvenile offenders, and that each of these seven had either abolished the practice or publicly disavowed it by the time *Roper* was heard.

532. *See, e.g.*, Richard A. Posner, *The Supreme Court, 2004 Term-Foreword: A Political Court*, 119 *HARV. L. REV.* 31 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 *HARV. L. REV.* 148 (2005); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, *POL'Y REV.*, June/July 2005, at 33, 47-49.

that “[t]he premise . . . that American law should conform to the laws . . . of the world ought to be rejected out of hand.”⁵³³ As Justice Breyer noted in *The Court and the World*, however, it is increasingly appropriate and important in today’s inter-connected world that the Supreme Court look beyond the country’s borders, especially when dealing with interpretive questions involving international human rights.⁵³⁴

CONCLUSION

Despite broad public support for legislative measures that could reduce gun violence, the U.S. government and state legislatures consistently fail to adopt them. The current patchwork of federal and state legislation is insufficient to prevent the gun violence plaguing the United States, and the political obstacles to reform sometimes seem overwhelming. Many people thought that Sandy Hook would be a turning point.⁵³⁵ But of the roughly 600 state gun laws enacted in the six years after Sandy Hook, almost two-thirds were supported by the NRA and loosened restrictions on ownership and use of guns.⁵³⁶

The Parkland shooting – the deadliest U.S. high school shooting in U.S. history – led to renewed calls for action. The students of Marjory Stoneman Douglas High School began a political campaign that reignited a national movement for effective gun control. Yet the impact of their activism is unclear. The Florida House of Representatives refused to even

533. *Roper*, 543 U.S. at 1226 (Scalia, J. dissenting). See also *id.* at 1226-1228. Justice Scalia was joined in his dissent by Justice Thomas and Chief Justice Rehnquist.

534. JUSTICE STEPHEN BREYER, *THE COURT AND THE WORLD* 281 (2016) (“[T]he Supreme Court must increasingly consider the world beyond our national frontiers. In its growing interdependence, this world of laws offers new opportunities for the exchange of ideas . . .”).

535. See, e.g., Chris Cillizza, *The Gun Debate: Are the Newtown, Conn., Killings a Tipping Point?*, WASH. POST (Dec. 16, 2012), articles.washingtonpost.com/2012-12-16/politics/35864130_1_gun-control-gun-ownership-stricter-gun-laws; Douglas Kellner, *The Sandy Hook Slaughter: Turning Point for Gun Control?*, HUFFINGTON POST (Feb. 19, 2013), www.huffingtonpost.com/douglas-kellner/the-sandy-hook-slaughter_b_2332744.html.

536. See Matt Vasilogambros, *NRA Has Backed Most State Gun Laws Passed since Sandy Hook*, PBS (Mar. 2, 2018), www.pbs.org/newshour/politics/nra-has-backed-most-state-gun-laws-passed-since-sandy-hook. See also Michael Luca et al., *The Impact of Mass Shootings on Gun Policy* 3 (Harvard Bus. Sch., Working Paper No. 16-126, 2016) (from 1989-2014, mass shootings led to a 75% increase in laws that *loosen* gun restrictions in states with Republican-controlled legislatures, and had no statistically significant effect on laws enacted in states with Democrat-controlled legislatures).

consider an assault weapons ban just days after the shooting. Instead, the legislature narrowly passed a school safety bill⁵³⁷ which included the implementation of a three-day waiting period for firearm purchases, banned the sale or possession of bump stocks, and raised the legal age limit to purchase guns from eighteen to twenty-one, but also contained a controversial provision creating a “guardian” program, which would enable some teachers and other school employees to carry handguns on campus. Meanwhile, district officials responded with regulations requiring the use of clear plastic backpacks and mandatory identification badges.⁵³⁸

At the federal level, President Trump initially promised concrete action, including gun control measures,⁵³⁹ but abandoned these commitments less than two weeks later after meeting privately with NRA officials.⁵⁴⁰ Instead, he proposed to increase armed guards at schools and arm teachers, and the current Secretary of Education, Betsy DeVos, proposed allowing schools to use federal education funds for firearms and firearm training, reversing a longstanding federal practice.⁵⁴¹ The presidents of the two largest unions that represent teachers and school staff denounced President Trump’s proposal, calling it “ill-conceived, preposterous, and dangerous,”⁵⁴² but just as this Article was going to press, Florida’s State Senate voted to arm teachers, largely over the opposition of the Parkland students, on a vote of 22-17, along party lines, with one Republican joining the sixteen Democrats.⁵⁴³ Non-solutions such as this

537. FLA. STAT. ANN. § 790.065(13) (West, Westlaw through the 2018 Second Reg. Sess. of the 25th Leg.).

538. Letter from the School Board of Broward County, Florida to Parkland Families (Mar. 21, 2018), <https://assets.documentcloud.org/documents/4418150/pages/Letter-to-Parkland-families-p1-normal.gif>.

539. Michael D. Shear, *Trump Stuns Lawmakers with Seeming Embrace of Comprehensive Gun Control*, N.Y. TIMES (Feb. 2, 2018), www.nytimes.com/2018/02/28/us/politics/trump-gun-control.html. This included increasing the age limit to purchase assault rifles and support for 2013 legislation that would have drastically expanded mandatory background checks. *Id.*

540. Michael D. Shear & Sheryl Gay Stolberg, *Conceding to N.R.A., Trump Abandons Brief Gun Control Promise*, N.Y. TIMES (Mar. 12, 2018), www.nytimes.com/2018/03/12/us/politics/trump-gun-control-national-rifle-association.html.

541. Erica L. Green, *Betsy DeVos Eyes Federal Education Grants to Put Guns in Schools*, N.Y. TIMES, (Aug. 23, 2018), www.nytimes.com/2018/08/23/us/politics/devos-guns-in-schools.html.

542. Press Release, National Education Association, *New NEA National Survey: Educators Overwhelmingly Reject Proposals to Arm Teachers* (Mar. 13, 2018), www.nea.org/home/72972.htm.

543. Patricia Mazzei, *Florida Moves Toward Arming Teachers, Despite Opposition from Parkland Students*, N.Y. TIMES (Apr. 23, 2019), www.nytimes.com/2019/04/23/us/florida-teacher-armed.html.

have given rise to a feeling of hopelessness and futility in the United States that nothing effective will be done,⁵⁴⁴ even though reasonable gun control laws that include licensing, background checks, safe storage requirements, prohibitions on military-style weapons, and “red flag” laws are clearly constitutional, can reduce gun violence, and are supported by a majority of Americans.

As this Article has established, the United States leads the developing world in civilian gun ownership, gun-related suicides, and gun-related homicides. The problem has already attracted the attention of the international community and international human rights bodies and is so severe that it violates at least ten separate categories of international human rights. At the same time, as we have recognized, although international human rights bodies can monitor the situation, communicate with the United States, and issue recommendations, real change will have to take place at the national level. The attachment of non-self-executing declarations to the human rights treaties ratified by the United States Senate makes direct litigation under those treaties extremely difficult. That means that the most successful use of human rights law will be in shoring up arguments that can be advanced under U.S. law, as well as in its ability to influence the political climate in the United States. Indeed, given that the difficulty is largely *political* rather than *legal*, considering the problem from a human rights perspective offers real value.

There are some promising signs in this regard. The Parkland students, for example, have demanded a human right to “safety in school.”⁵⁴⁵ Likewise, following the Tree of Life Synagogue shooting, one activist stated: “We have a human right to live and work in our neighborhoods without fear of gun violence; we have a human right to attend church

544. Allen Rostron, *A New State Ice Age for Gun Policy*, 10 HARV. L. & POL’Y REV. 327, 332-35 (2016) (reviewing the failure of Congress to act following every mass shooting since the 2012 Sandy Hook elementary school shooting).

545. See, e.g., Andrew Cass, *Mentor Students March to Rep. Joyce’s Office to Advocate for Gun Control*, THE NEWS-HERALD (Apr. 20, 2018), www.news-herald.com/news/ohio/mentor-students-march-to-rep-joyce-s-office-to-advocate/article_fba81844-a0f1-5366-8037-53402f947598.html (quoting a student at a march for gun control as saying: “Safety in schools is not a privilege, it’s a human right”); *Local students to protest gun violence on National Walkout Day*, WMC ACTION NEWS 5- MEMPHIS (Apr. 20, 2018), www.wmctionnews5.com/story/38002049/local-students-to-protest-gun-violence-on-national-walkout-day/ (quoting a student protesting school shootings as saying: “[w]e are trying to make the community better and try to stand for every person’s human right”).

synagogues and concerts without fear of gun violence.⁵⁴⁶ Amnesty International is now also conducting a human rights campaign to fight gun violence.⁵⁴⁷ Earlier this year the U.S. House of Representatives passed the most significant gun control legislation in over two decades, taking a big step towards closing the background check loophole.⁵⁴⁸ The following day, the House advanced legislation to give the FBI more time to conduct background checks on gun purchases, as opposed to automatically allowing a sale to go through if the check cannot be completed within three days.⁵⁴⁹ This would close the so-called “Charleston loophole,” by which a white supremacist was able to purchase the gun used to kill nine people at an historically black church.⁵⁵⁰

Human rights remedies are not the only response to America’s gun violence problem, of course, but they are an important part of the solution. The public health community is addressing it from a public health perspective, involving education and suicide prevention, and developing community intervention strategies.⁵⁵¹ Yet Americans should know that they have human rights too, and that the abysmal failure of the U.S. government to address the gun violence crisis is violating them. As Eleanor Roosevelt wrote in 1958:

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual

546. Ariel Worthy, *Public Hearing Draws Over 100 People To Debate Proposed City Gun Legislation*, 90.5 WESA, PITTSBURGH’S NPR NEWS STATION (Jan. 25, 2019), www.wesa.fm/post/public-hearing-draws-over-100-people-debate-proposed-city-gun-legislation.

547. See AMNESTY INTERNATIONAL, *IN THE LINE OF FIRE*, *supra* note 15.

548. Bipartisan Background Checks Act of 2019, H.R. 8, 116th Cong. (1st Sess. 2019).

549. Enhanced Background Checks Act of 2019, H.R. 1112, 116th Cong. (1st Sess. 2019).

550. Unfortunately, even if these bills pass the Senate, President Trump has signaled his intention to veto the bills. See Braktkton Booker & Martin Kaste, *House Passes Second Gun Background Check Bill In As Many Days*, NPR (Feb. 28, 2019), www.npr.org/2019/02/28/698990518/house-passes-second-gun-background-check-bill-in-as-many-days.

551. See generally CHELSEA PARSONS ET AL., CTR. FOR AM. PROGRESS, *FRAMEWORK FOR ACTION: 28 IDEAS FOR STATE EXECUTIVE ACTION TO PREVENT GUN VIOLENCE AND FIGHT GUN CRIME* (2015), www.americanprogress.org/issues/guns-crime/reports/2015/12/15/127399/framework-for-action/; EVERYTOWN FOR GUN SAFETY SUPPORT FUND, THE NATIONAL URBAN LEAGUE & MAYORS AGAINST ILLEGAL GUNS, *STRATEGIES FOR REDUCING GUN VIOLENCE IN AMERICAN CITIES* (2016), <https://everytownresearch.org/documents/2016/06/strategies-reducing-gun-violence-american-cities.pdf>; AMNESTY INTERNATIONAL, *IN THE LINE OF FIRE*, *supra* note 15, at 65, 167-170.

person: the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.⁵⁵²

552. Eleanor Roosevelt, *supra* note 13.