

# *The Shooting Cycle*

*Josh Blackman & Shelby Baird*

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

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

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

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*Josh Blackman<sup>1</sup> & Shelby Baird<sup>2</sup>*

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

President Barrack Obama, March 28, 2013

## **Introduction**

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

This article offers a sober look at what we label the shooting cycle, and assesses how people and governments respond to mass killings. This article does not offer any normative judgment on whether gun regulations hinder or contribute to gun violence, or the influence that lobby groups on both side of the debate exert, or the constitutional arguments regarding the Second Amendment. Rather, we aim to describe this phenomenon, offer observations about how governments and people react, or do not respond, to these tragedies, and draw conclusion on how this cycle change be changed.

We address this important issue in five parts. In Part I, we define the term “shooting,” and quantify how frequent they occur. Shootings, labeled “mass murders” by the FBI, are killings where the “four or more [murders] occur[] during the same incident, with no distinctive

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time period between the murders.”<sup>3</sup> These statistics exclude the overwhelming majority of death-by-firearms, though they capture the most attention. More precisely, mass shootings represent roughly .1% of all homicides by gunfire. Contrary to public opinion, they aren’t nearly as common as the media may perceive them, and they aren’t occurring more frequently in recent years. Rather, the rate has remained roughly constant over the last five decades.

In Part II, we rely on heuristics and cognitive biases to explain why these rare, but horrible events, hold such a prevalent place in the American zeitgeist. The *availability heuristic* leads people to overweigh the prominence of events that are easily retrievable from memory. In addition, people tend to consider unfamiliar events that they cannot relate to as being more risky. Further, those who have preexisting views on a certain topic are more likely to view harm in a way that gratifies their predisposition. These heuristics help to explain the media attention to, and political salience of mass shootings.

In Part III, we chronicle what we refer to as the shooting cycle. This painfully familiar pattern begins with a *tragedy*, as news breaks that a deranged gunman at some public place has inflicted mass casualties. The *tragedy* gives way to *introspection* as society attempts to make sense of what happened, and resolve to make sure it never happens again. With that resolve, society turns to *action*, as politicians, fueled by the emotions of the tragedy, offer solutions to stop not only mass shootings, but also are aimed at the broader problem of gun violence. Soon consensus for change is fractured by *divergence*, as the emotions from the tragedy fade, support dwindles for reform, and opposition grows. With time, the *divergence* brings us back to the *status quo*, as support for reform regresses to the mean, and returns to the pre-tragedy level.

In Part IV, we consider several concepts that help explain the changes during the shooting cycle. We begin by measuring the support for stricter gun control laws over the past two decades according to five polling firms. This graph shows an overall downward trend of support, with the exception of brief spikes in support following mass shootings at Columbine, Virginia Tech, and Newtown. After each spike, there is an even steeper decline, as support returns to the ex ante status quo. We explain the spikes as a result of *emotional capture*, where the emotions following the tragedy cause a heightened level of support for gun control. Politicians rely on this support to advance legislative agendas that would not have succeeded before the tragedy. But this support is short-lived. We explain the decline after the spike as an incidence of *regression to the mean*, whereby sentiments return to their pre-tragedy level as emotions fade. Our research also shows that the mean is in fact declining. In other words, after each spike subsides, support for gun control is even lower than it was before the shooting. These data explain, in part, why politicians seek to enact reforms quickly during the period of emotional capture before the passions fade.

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

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<sup>3</sup> Federal Bureau of Investigation National Center for the Analysis of Violent Crime, *Serial Murder: Multi-Disciplinary Perspectives for Investigators* (2005), available at <http://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-1#two>.

which support for gun control weakened, followed by the defeat of any new federal legislation. On the one-year anniversary of Newtown, society returned to the status quo.

This contribution to a symposium issue of the *CONNECTICUT LAW REVIEW* on the Second Amendment, peels back much of the rhetoric surrounding gun violence, and, distant from the passions, explores how the government and people react to these tragedies.

## I. Shooting

Although the media frequently uses the term *shooting*, it fails to define what this term means. In this part we offer generally-accepted definitions of what a shootings are, how frequent they are in comparison to other forms of gun deaths, and whether they are occurring more frequently over time. In short, shootings are extremely rare, and are not increasing in frequency. One of our goals of this article is to clarify the definitions of these tragedies, and offer a neutral vocabulary to explore these difficult topics.<sup>4</sup>

### A. Defining the Shooting

“Shooting” is not considered a term of art among criminologists. The closest approximation is the “mass murder.” The government does not keep statistics focusing specifically on of “mass shootings.” Politifact observed that despite reading through the FBI’s Uniform Crime Report<sup>5</sup> and the Bureau of Justice Statistics’ National Crime Victimization Study,<sup>6</sup> they could not “find any published statistics on mass shootings.”<sup>7</sup> The FBI defines a “mass murder,” as distinguished from a “serial murder,” as “a number of murders (four or more) occurring during the same incident, with no distinctive time period between the murders.”<sup>8</sup> Two of the leading scholars on mass murder, Professors James Alan Fox and Jack Levin, define mass murder more precisely, as the “slaughter of four or more victims by one or a few assailants within a single event, lasting but a few minutes or as long as several hours.”<sup>9</sup> As Fox and Levin noted, in “striking contrast to the expanding scholarly interest in serial homicide, mass killings—the slaughter of victims during a single act or a short-lived crime spree—have received relatively

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<sup>4</sup>Dan Kahan & Donald Braman, *More Statistics, Less Persuasions: A Cultural Theory of Gun-Risk Perception*, 131 U. PENN. L. REV. 1291, 1324 (2003). (“Our plea is that scholars of gun control turn their attention to the project of constructing a new expressive vocabulary for carrying such deliberations forward. As the persistent and persistently vituperative character of the gun debate demonstrates, the emergence of a pertinent, civilized, and constructive discussion of the cultural values that inform the gun debate cannot be taken for granted.”).

<sup>5</sup> *FBI Releases Preliminary Semiannual Crime Statistics for 2010*, Federal Bureau of Investigation (Dec. 20, 2010), [http://www.fbi.gov/news/pressrel/press-releases/prelimsemiucr\\_122010](http://www.fbi.gov/news/pressrel/press-releases/prelimsemiucr_122010)

<sup>6</sup> Jennifer Truman & Michael Rand, *Bureau of Justice Statistics Bulletin: Criminal Victimization, 2009* (Oct. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf>

<sup>7</sup> “*This Week*” report says hundreds have died in multiple-victim shootings, Politifact (Jan. 11, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>

<sup>8</sup> Federal Bureau of Investigation National Center for the Analysis of Violent Crime, *Serial Murder: Multi-Disciplinary Perspectives for Investigators* (2005), available at <http://www.fbi.gov/stats-services/publications/serial-murder/serial-murder-1#two>.

<sup>9</sup> James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 CRIME J. 407, 429 (1998).

little consideration.”<sup>10</sup> We will rely on the definition of mass murder as defined by Professors Fox and Levin, and use the term “mass shooting” interchangeably.

## B. Shooting Trends

Contrary to popular perceptions, mass shootings are rare, constituting a tiny share of homicides. The magazine *Mother Jones* offers a detailed, comprehensive list of mass shootings between 1982 and the present, counting 67 mass shootings.<sup>11</sup> The *New Republic*, building on the *Mother Jones* report, counted 70 mass shootings between 1982 and 2012.<sup>12</sup> Though each loss of life is tragic, these deaths constitute a very, very small percentage of gun homicides. In 2005, 0.12% of homicides involved four victims (the threshold for a mass shooting).<sup>13</sup> To put that in perspective, roughly 1 out of every 1,000 gun homicides results from a mass shooting.<sup>14</sup> If you decrease the threshold to three victims, the rate rises to 0.60%.<sup>15</sup> Another study revealed that between 1976 and 2005, “less than 1/5 of 1% (0.18%) of all murders in the United States involved four or more victims.”<sup>16</sup>

Even among mass murders, the “indiscriminate slaughter of strangers”—what is commonly portrayed as a mass shooting—“is the exception to the rule.”<sup>17</sup> From 1976-1995, 39.4% of mass murders were “familicides,” where the victim was related to the shooter, and 38.2% were people the shooter knew.<sup>18</sup> Only 21.4% of the victims of the 483 mass murders during this period were strangers. In other words, even among the small number of mass shootings, an even smaller share are indiscriminate killings in public places, such as schools or movie theaters. As a total percentage of unfortunate bloodshed, mass shootings are a small, small sliver that nonetheless captures a huge percentage of the public fascination.

Further, contrary to what the zeitgeist may suggest, mass shootings are not on the rise. Professor James Alan Fox has found that “[d]espite the huge media coverage devoted to them,

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<sup>10</sup>James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 *CRIME J.* 407, 430 (1998).

<sup>11</sup> As of December 2013, there are 67 mass shootings on the list. See Mark Follman, Gavin Aronsen, Deanna Pan & Maggie Caldwell, *US Mass Shootings, 1982-2012: Data From Mother Jones' Investigation*, *Mother Jones* (Dec. 28, 2012) available at <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data>

<sup>12</sup> Amy Sullivan, *Mass Shootings Are on the Rise—And 2012 Has Been Deadlier Than Ever Before*, *New Republic* (Dec. 14, 2012), <http://www.newrepublic.com/blog/plank/111149/why-are-mass-shootings-the-rise#>

<sup>13</sup> “*This Week*” report says hundreds have died in multiple-victim shootings, *Polifact* (Jan. 11, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>

<sup>14</sup> “*This Week*” report says hundreds have died in multiple-victim shootings, *Polifact* (Jan. 11, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>

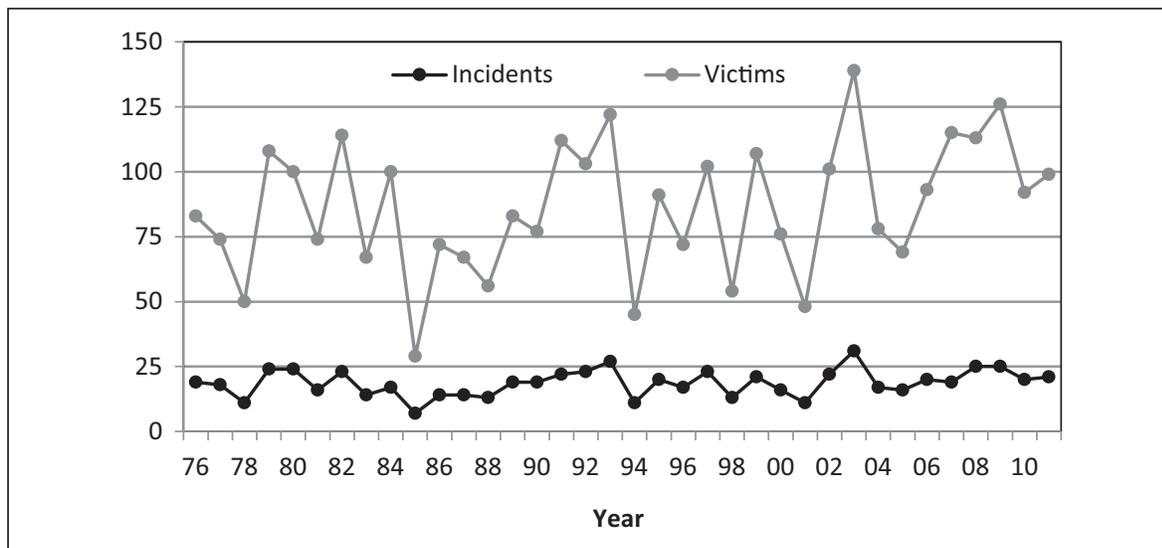
<sup>15</sup> “*This Week*” report says hundreds have died in multiple-victim shootings, *Polifact* (Jan. 11, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>

<sup>16</sup> Mark B. Melter, *The Kids Are Alright; It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 *Gonz. J. Int'l L.* 33, 35 (2012) citing Homicide Trends in the U.S., BUREAU OF JUSTICE STATISTICS (Feb. 28, 2011), <http://bjs.ojp.usdoj.gov/content/homicide/tables/multivictab.cfm>.

<sup>17</sup> James Alan Fox, Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 *Crime & Just.* 407, 438 (1998).

<sup>18</sup> James Alan Fox, Jack Levin, *Multiple Homicide: Patterns of Serial and Mass Murder*, 23 *Crime & Just.* 407, 434 (1998).

crime statistics show that there is no upward trend in mass killings.”<sup>19</sup> Fox and DeLateur offer an alternate analysis based on “the FBI’s Supplementary Homicide Reporting (SHR) program” from 1976 to 2011 that reflects “all 672 mass shootings with at least four fatalities reported to local law enforcement authorities.”<sup>20</sup>



**Figure I.** Mass shootings in the United States, 1976-2011.

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

According to another analysis by Politifact, which considered these events over the past three decades, there is no clear trend in the number of annual mass shootings: 1976-1980 (20.6 incidents annually), 1981-1985 (16.8), 1986-1990 (18.2), 1991-1995 (23.0), 1996-2000 (20.0), 2001-2005 (21.0), 2006-2009 (25.5).<sup>21</sup> Politifact rated as “half true” a statement that recent shootings in Arizona reflect a “disturbing trend.” Rather than a “disturbing trend,” Politifact

<sup>19</sup> Laura Smith-Spark, *Are mass killings on the increase? Criminologist says no*, CNN (April 3, 2012), <http://www.cnn.com/2012/04/03/us/us-mass-killings/>

<sup>20</sup> James Alan Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, *Homicide Studies*, published online 18 December 2013 at 5 <http://hsx.sagepub.com/content/early/2013/11/27/1088767913510297>

<sup>21</sup> “*This Week*” report says hundreds have died in multiple-victim shootings, Politifact (Jan. 11, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>

observed that the number of mass shootings in 2007 (23), 2008 (29), and 2009 (27) barely changed; it was “statistical noise.”<sup>22</sup> This reflects Professors Fox and DeLateur’s findings.

Noted criminologist Gary Kleck observes that “It would be misleading to suggest that there was some long-term upward trend in mass shootings since 1976.” He added, “The exact number are highly unstable, but ignoring small, year-to-year fluctuations, there was no trend one way or the other from 1976 to 2009. Further, if these figures were computed on a per-capita basis, taking into account population increases, the long-term trend in the rate would be downward.”<sup>23</sup> These numbers even hold true throughout most of the twentieth century, as “mass murder”—slightly different from mass shootings—“was nearly as common during the 1920s and 30s as it has been since the mid-1960s.”<sup>24</sup> Further, as Professor Mark Melter points out, “the mass shooting rate has remained relatively stable over the past forty years” as compared with “the rates of homicide and serious violent crime have dropped significantly during the same period.”<sup>25</sup> The rate of mass shootings has remained nearly constant, notwithstanding numerous other changes in our increasingly-safer society.

Specifically, mass shootings on college campuses are also not as common as popular culture would suggest. Professor Fox observed that, “Overall in this country, there is an average of 10 to 20 murders across campuses in any given year.”<sup>26</sup> As noted, single homicides are much, much less common than mass murders. Fox continues, “Compare that to over 1,000 suicides and about 1,500 deaths from binge drinking and drug overdoses annually.”<sup>27</sup> A 2011 study looking into the causes of death of college students, conducted across 157 four-year institutions, comprising 1,361,304 students, found that the annualized mortality rate per 100,000 students was, ranked from highest to lowest, (1) suicide 6.18, (2) alcohol related traffic deaths 3.37, (3) unknown cause 3.00, (4) cancer (1.94), (5) alcohol related non-traffic injury (1.49), and finally (6) homicide (0.53).<sup>28</sup> Homicide—not from mass shootings—trails far, far behind on causes of deaths. For every 200,000 college students, roughly two die per year due to homicide (to say nothing of a mass shooting), while thirteen die from suicide and 7 die from drunk driving. Similar trends hold true for safety in K-12 schools, which garnered a significant amount of attention in the wake of the tragedies of Columbine and Newtown. According to a report by the Center for Disease Control, the probability of a child “dying in school in any given year from

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<sup>22</sup> “*This Week*” report says hundreds have died in multiple-victim shootings, Polifact (Jan. 11, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>. Cf. Mark B. Melter, *The Kids Are Alright; It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 *Gonz. J. Int'l L.* 33, n. 35 (2012) (“There were on average 22.25 incidents and 108.75 victims from 2006-2009. By contrast, there were on average 18.46 incidents and 84.46 victims between 1976-2010.”).

<sup>23</sup> “*This Week*” report says hundreds have died in multiple-victim shootings, Polifact (Jan. 11, 2011), <http://www.politifact.com/truth-o-meter/statements/2011/jan/11/pierre-thomas/week-report-says-hundreds-have-died-multiple-victi/>

<sup>24</sup> Grant Duwe, *A Circle of Distortion: The Social Construction of Mass Murder in the United States*, 6 *W. CRIMINOLOGY REV.* 59, 60 (2005).

<sup>25</sup> Mark B. Melter, *The Kids Are Alright; It's the Grown-Ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 *Gonz. J. Int'l L.* 33, 38 (2012).

<sup>26</sup> Laura Smith-Spark, *Are mass killings on the increase? Criminologist says no*, CNN (April 3, 2012), <http://www.cnn.com/2012/04/03/us/us-mass-killings/>

<sup>27</sup> Laura Smith-Spark, *Are mass killings on the increase? Criminologist says no*, CNN (April 3, 2012), <http://www.cnn.com/2012/04/03/us/us-mass-killings/>

<sup>28</sup> James C. Turner, MD & Adrienne Keller, MD, *Leading causes of mortality among American college students at 4-year institutions*, American Public Health Association (Oct. 29, 2011), <https://apha.confex.com/apha/139am/recordingredirect.cgi/id/45544>

homicide or suicide was less than one in 1 million between 1992 and 1994 and slightly greater than one in 2 million between 1994 and 1999.”<sup>29</sup>

A study performed by USA Today quantified the number of *mass killings*, rather than *mass shootings*, which include incidents where four or more people are killed by any means, including gun shot, in addition to smoke inhalation, stabbing, strangulation/suffocation, blunt force, and drowning.<sup>30</sup> Even with this expanded metric, the study concluded that “the number of mass killings has not increased in recent years.”<sup>31</sup> A report from the Advanced Law Enforcement Rapid Response Training (ALERRT) Center at Texas State University found an increase from 2000 to 2013 in the number of “active shootings in public settings where the primary motive appeared to be mass murder and at least *one* of the victims was unrelated to the suspect.”<sup>32</sup> But these active shooter situations are not mass shootings, as it includes incidents with a single, rather than four, deaths.

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

## II. Heuristics and Perceptions of Shootings

If mass shootings are rare, constitute a tiny percentage of gun homicides, and have not been occurring more frequently, why are they so salient today? While a comprehensive answer to this question is far beyond the scope of this article, an exploration of several heuristics and innate cognitive biases may shed light on this very understudied question. Heuristics and cognitive biases, simply defined, are mental “rule[s] of thumb to make a difficult judgment.”<sup>33</sup> More precisely, they refer to the various thought processes by which people go about making tough decisions.<sup>34</sup>

First, the availability heuristic leads us to overweigh the prominence of events that are easily retrievable from our memories. Mass shootings that receive widespread media attention dominate our collective consciousness, more so than other gun deaths with less coverage. Therefore, people perceive that they occur more frequently than they actually do. Second, people

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<sup>29</sup>Harding, David, Cybelle Fox, & Jal Mehta, *Studying Rare Events Through Qualitative Case Studies: Lessons from a Study of Rampage School Shootings*, 31 Sociological Methods Research 174 (2002).

<sup>30</sup><http://usatoday30.usatoday.com/news/nation/mass-killings/index.html#title>

<sup>31</sup><http://www.usatoday.com/story/news/nation/2013/12/03/fbi-mass-killing-data-inaccurate/3666953/>

<sup>32</sup><http://news.yahoo.com/spike-in-mass-shootings-creates-demand-for-different-police-approach-132625638.html> “The rate at which these events occurred went from approximately one event every other month between 2000 and 2008 (5 per year) to more than one a month between 2009 and 2012 (almost 16 per year). Our tracking also indicates that this increased rate has continued into 2013.”

<sup>33</sup> DANIEL KAHNEMAN, THINKING, FAST, AND SLOW 7 (2011).

<sup>34</sup> Gregory Mitchell, *Mapping Evidence Law*, 2003 Mich. St. L. Rev. 1065, 1148 (2003) (“Kahneman and Tversky suggest that people rely on a number of simplifying strategies, or rules of thumb, in making decisions. These simplifying strategies are called heuristics. They are the standard rules that implicitly direct our judgment. They serve as a mechanism for coping with the complex environment surrounding our decisions. In general, heuristics are helpful, but their use can sometimes lead to severe errors.”).

tend to weigh the risks of unfamiliar, unknown events more heavily than those they are familiar with. In other words, the (thankfully) unfamiliar tragedy for most, for example, a person being killed in a mass shooting, tends to seem more prevalent than other, more known (and more common) forms of death, such as accidental drowning in a pool. Third, people with preexisting views towards certain issues are more likely to see events that result in harm through a lens that gratifies their own predispositions. Stated simply, people amplify the extent of tragedies that jibe with their views of the world. Fourth, “in-group” bias helps to describe why people tend to favor victims of their own group over dissimilar outsiders. All of these heuristics provide insight into popular perceptions of mass shootings.

### A. The Availability Heuristic

The “availability heuristic,” or “availability effect” helps to explain why rare mass shootings occupy such a prominent place in the American zeitgeist. The availability heuristic is the “process of judging frequency by ‘the ease with which instances come to mind.’”<sup>35</sup> Nobel Prize Laureate Daniel Kahneman defines this process: “instances of the class will be retrieved from memory, and if retrieval is easy and fluent, the category will be judged to be large.”<sup>36</sup> In other words, if some class of events is readily available in your memory, and it is easy to retrieve, you will overestimate its prevalence because it is *available*. Kahneman, along with his long-time colleague, the late Amos Tversky, observed that people implicitly utilize the availability heuristic when making decisions: “people assess the frequency of a class or the probability of event by the ease with which instances or occurrences can be brought to mind.”<sup>37</sup> Professor Dan Kahan notes that the related “availability effect” refers to “to the tendency of people to overestimate the incidence of risks involving highly salient or emotionally gripping events relative to less salient, less sensational ones.”<sup>38</sup> Salience is as important as familiarity for this heuristic.

Let’s put the statistics about shootings discussed in the previous section into context through the lens of the availability heuristic. Mass shootings are very, very rare. Yet, due to extensive media coverage on the 24-hour news cycle, and attention given to them by politicians, these events remain fresh in our memories and are very salient. In comparison, the overwhelming majority of gun homicides receive a tiny fraction of this coverage. These attributes make deaths by mass shootings—as opposed to the other 99.9% of gun deaths we seldom hear about—much more “retrievable.” Based on the availability heuristic, people tend to think that mass shootings are much more prominent than they really are.

For example, a spate of shootings in 2011 and 2012—the shooting of Rep. Gabby Giffords in Tucson, the shooting at the movie theater Aurora, a shooting at a Sikh Temple in Milwaukee, and the shooting at Newtown—had almost no similarities in means and motives

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<sup>35</sup> DANIEL KAHNEMAN, THINKING, FAST, AND SLOW 129 (2011).

<sup>36</sup> DANIEL KAHNEMAN, THINKING, FAST, AND SLOW 129 (2011).

<sup>37</sup> Amos Tversky & Daniel Kahneman, *Heuristics and Biases: Judgment Under Uncertainty*, 185 Science 1127 (1974).

<sup>38</sup> Dan Kahan, *Who sees accidental shootings of children as evidence in support of gun control & why? The “cultural availability” effect*, The Cultural Cognition Project at Yale Law School (May 3, 2013), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

other than the fact that there were mass casualties by gunfire. But, the recency and salience of these events leads people to lump them together into the larger umbrella of gun violence.<sup>39</sup>

## B. Weighing Risks of Unfamiliar Events

A related heuristic focuses on how people weigh unfamiliar events. This heuristic is more intuitive: the fear of the unknown is greatest. More precisely, people often overweigh the risk of unfamiliar events. Consider the related topic of accidental shootings of young children (primarily where a child uses the firearm to kill him or herself). Though these events are horrible, and avoidable tragedies, like mass shootings, they are also very uncommon. Professor Dan Kahan observes that there are on average less than 1,000 accidental gun homicides of children per year.<sup>40</sup> In comparison, there are roughly 3,500 drowning deaths of children per year.<sup>41</sup> Three-and-a-half more children die by drowning in a pool than by accidentally shooting themselves. We stress, as does Professor Gary Kleck, that “the point is not that guns are safe because they cause accidental death less often than” more familiar causes, such as drownings, but to provide a “meaningful point of reference.”<sup>42</sup>

Research performed by Professors Hertwig, Barron, Weber, and Erev demonstrates that people make different decisions when drawing from description of risky prospects they are unfamiliar with rather than from their own experiences.<sup>43</sup> When people make “decisions from description,” that is something unfamiliar they have never experienced personally, they tend to “overweigh the probability of rare events.” In contrast, when they make choices from familiar experiences, so called “decisions from experience,” they “underweigh the probability of rare events.”<sup>44</sup> In other words, people will underweigh the risk of something they are familiar with—for example, death by drowning in a pool. After all, most people have been in a pool, seen a lifeguard, and are aware of the possibility of children drowning. But, they will overweigh the risk of something they only learn about from descriptions—such as media reports about death by firearm violence. These are rare tragedies that (thankfully) impact very few people personally.

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<sup>39</sup> Joel Best, *How Should We Classify the Sandy Hook Killings*, Reason.com (Jun. 16, 2013), <http://reason.com/archives/2013/06/16/the-politics-of-gun-violence/print>

But the Newtown shootings followed a number of other high-profile shooting incidents outside of schools, including the 2011 shooting of Rep. Gabrielle Giffords (D-Ariz.) and some 2012 incidents at a movie theater near Denver, a Sikh temple outside Milwaukee, and a Minneapolis factory, settings with little in common.

<sup>40</sup> Dan Kahan, *Who sees accidental shootings of children as evidence in support of gun control & why? The “cultural availability” effect*, The Cultural Cognition Project at Yale Law School (May 3, 2013), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

<sup>41</sup> Dan Kahan, *Who sees accidental shootings of children as evidence in support of gun control & why? The “cultural availability” effect*, The Cultural Cognition Project at Yale Law School (May 3, 2013), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

<sup>42</sup> GAR KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA, 272 (2005). Table 7.1. Also, As Professor Gary Kleck points out in *Point Blank*, in 1980, “the accidental death rate for motor vehicles is 15 times as high as for guns when based on the number of” households that own both guns and vehicles, and “29 times as high when based on number of devices in existence.”

<sup>43</sup> Hertwig, Ralph, Greg Barron, Elke U. Weber, & Ido Erev, *Decisions From Experience and the Effect of Rare Events in Risky Choice*, 15 Psychological Science 534 (2004).

<sup>44</sup> Hertwig, Ralph, Greg Barron, Elke U. Weber, & Ido Erev, *Decisions From Experience and the Effect of Rare Events in Risky Choice*, 15 Psychological Science 534 (2004).

Professor Kahan questions why these accidental shootings “get so much media coverage relative to the other things that kill children.”<sup>45</sup> The answer, in part, is based on how we perceive death of a child by accidental gunfire and death of a child by accidental drowning. Most people are roughly familiar with a swimming pool and perhaps have had incidents where they had trouble swimming (perhaps in their childhood). The risk of drowning, though horrific, is somewhat familiar, and perhaps even acceptable. A colleague who strongly supports gun control described death of a child by drowning as a “legitimate” accident. When asked why it was “legitimate,” she explained that death by drowning was “understandable,” while death by gun was not. She said it was more acceptable to leave a child unsupervised near a swimming pool, than to leave a child, unsupervised near a gun. But is this the case? While it is certainly true that to an adult, a swimming pool—designed for leisure instead of harm—is exponentially safer than a gun, the same does not hold true for a child. To a toddler, crawling unsupervised alongside a large inground swimming pool is just as, if not more, lethal than the same toddler playing alone with a gun (equipped with a safety, and heavy trigger pull).

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

Further, rare events that we are unfamiliar with rouse uncertainty, and increase cautious reactions and reliance on prior beliefs.<sup>46</sup> As a result, people are more concerned about preventing and dealing with the unknown, more so than events that are likely to occur on a frequent basis. This helps explain why after a shooting there is an inherent need to take steps to prevent future deaths by enacting gun control legislation, but less so after drownings in pools. Only a handful of states require the installation of fences around swimming pools in homes with small children.<sup>47</sup>

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

In one scene of Michael Moore’s movie *Bowling for Columbine*, the “documentary” team rushes to get footage from the scene of a reported accidental shooting only to discover when they arrive that television news crews are packing up their gear. “What’s going on? Did we miss it,” Moore asks, to which one of the departing TV reporters answers, “no, it was a false alarm—just a kid who drowned in a pool.” One would suspect Moore of trying to make a point—that the media’s responsiveness to the public obsession with gun accidents contributes to the public’s inattention to the greater risk for children posed by swimming pools—if the movie itself were not such an obvious example of exactly this puzzling, and self-reinforcing distortion. Apparently, it was just

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<sup>45</sup> Dan Kahan, *Who sees accidental shootings of children as evidence in support of gun control & why? The “cultural availability” effect*, The Cultural Cognition Project at Yale Law School (May 3, 2013), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

<sup>46</sup> Starbuck, William. "Cognitive Reactions to Rare Events: Perceptions, Uncertainty, and Learning." *Organization Science* 20.5 (2009): 929. Print.

<sup>47</sup> For example, Arizona requires the installation of fences for homes with children under the age of six. <http://www.azleg.state.az.us/ars/36/01681.htm>

one of those rare moments when 1,000 monkeys mindlessly banging on typewriters (or editing film) surprise us with genuine literature.<sup>48</sup>

Here, the media was only interested in covering the loss of a child if it was in a tragic, misunderstood, and headline-grabbing way. The availability heuristic helps to explain “why people seem so much more concerned about the risk of an accidental shooting of a child than the accidental drowning of one.”<sup>49</sup> Kahan concludes that “The pool comparison, though, does show how the ‘culture war’ over guns creates not only a very sad deformation of political discourse but also a weird selectively attention to empirical evidence.” This is a point we will return to later, in our discussion of the motivations of why the media and politicians, focus so heavily on the rare, but tragic deaths resulting from mass shootings.

### C. Cultural Predispositions

The availability and unfamiliar-event heuristics still do not completely explain why certain events are more salient than others. Professor Kahan’s “cultural cognition theory” offers more assistance. This theory states that “the cultural congeniality of seeing instances of harm that gratify one’s cultural predispositions,” helps explain “what accounts for the selective salience of various risks.”<sup>50</sup> Stated more simply, people pay closer attention to bad things that jibe with their previous views of the world. For example, an environmentalist is more likely to see a heat wave as a result of by global warming, which thus necessitates climate change legislation. Or, a free-market advocate who opposes President Obama’s economic agenda is more likely to view a downturn in the stock market as a reflection of the President’s policies, and lobby for economic reform.

Kahan explains, these heterogeneous predispositions “generate systematic differences in perceptions of risk among people with different values.”<sup>51</sup> “If people are more likely to notice risk-related contingencies congenial to their cultural predispositions, to assign them significance consistent with their cultural predispositions, and recall instances of them when doing so is supportive of their cultural predispositions, then the availability effect will generate systematic individual differences among culturally diverse individuals.”<sup>52</sup>

Cultural cognition theory applies to both sides of the gun debate. Kahan explains, those predisposed not to like guns, those who feel “revulsion and disgust” towards gun, are more likely to focus their attention “onto gun deaths, as opposed to other more common forms of death.”<sup>53</sup> For example, a person predisposed to favor gun control is likely to fixate on deaths by firearms, rather than other types of deaths (such as by accidental drowning), and see these losses as a

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<sup>48</sup> Dan Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, at 30, n. 3. (2008).

<sup>49</sup> Dan Kahan, *Who sees accidental shootings of children as evidence in support of gun control & why? The “cultural availability” effect*, The Cultural Cognition Project at Yale Law School (May 3, 2013), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

<sup>50</sup> Dan Kahan, *Who sees accidental shootings of children as evidence in support of gun control & why? The “cultural availability” effect*, The Cultural Cognition Project at Yale Law School (May 3, 2013), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

<sup>51</sup> Dan Kahan, *Who sees accidental shootings of children as evidence in support of gun control & why? The “cultural availability” effect*, The Cultural Cognition Project at Yale Law School (May 3, 2013), <http://www.culturalcognition.net/blog/2013/5/3/who-sees-accidental-shootings-of-children-as-evidence-in-sup.html>.

<sup>52</sup> Kahan, *Cultural Cognition as a Conception of the Cultural Theory of Risk*, at 31.

<sup>53</sup> Dan Kahan & Donald Braman, *More Statistics, Less Persuasions: A Cultural Theory of Gun-Risk Perception*, 131 U. PENN. L. REV. 1291, 1323 (2003).

reason to strengthen gun controls. Conversely, a person who is predisposed to favor gun rights, is likely to minimize deaths by firearm, and focus on their role in preventing crime. Kahan concludes, “individuals’ attitudes toward gun control are derivative of the type of social order they prize.”<sup>54</sup>

Further, the decision of the media to cover various accidents is, as Professor Kahan notes, “a (market-driven) reflection of the public demand for news relating to that very type of accident.”<sup>55</sup> This is what people want to see. Recall how the film crew packed up when they learned that a child died by drowning, and not by gunfire. What does it say about us as a society that we *desire* to see coverage of horrible tragedies? This observation, we’re sure, made you feel uncomfortable. People have disturbed sub-consciousness. People ogle at gruesome car wrecks.<sup>56</sup> People watch violent movies.<sup>57</sup> People enjoy violent sports.<sup>58</sup> People are drawn into gory, graphic video games that involve killing lots of people.<sup>59</sup> Even long ago, people enjoyed reading the gory tales of the Brothers Grimm.<sup>60</sup> Professors Fox and Levin recount, with disappointment, “more recently, we have extended our celebration to what some consider our new antiheroes, those who have distinguished themselves in the worst possible ways by reaching the pinnacle of ‘success’ as murderers.”<sup>61</sup> The reasons behind this hardwired morbid curiosity are beyond the scope of this article, but we suspect there is something deeper in the human psyche to help explain the phenomenon of reaction to mass shootings. Further, following Professor Kahan’s theories, we suspect that some in society fixate on these rare, but violent mass shootings because they are emboldened by their cultural predispositions to support gun control.

#### D. In-Group Bias

Another way to explain this duality in perception is through “in-group” bias. Under this heuristic, people tend to favor members of their own group over outsiders.<sup>62</sup> Because “people

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<sup>54</sup> Kahan, MORE STATISTICS, LESS PERSUASION: A CULTURAL THEORY OF GUN-RISK PERCEPTIONS at 1323

<sup>55</sup> Kahan, Cultural Cognition as a Conception of the Cultural Theory of Risk, at 30, n. 3. (“Disproportionate media coverage of various types of accidents is a weak explanation for the greater “availability” of them in the public mind, since the media’s incentive to cover one type of accident disproportionately is itself a (market-driven) reflection of the public demand for news relating to that very type of accident.”).

<sup>56</sup> Mark Rahner, *Gawking: Here’s why we rubberneck on the road*, The Seattle Times (June 10, 2002), <http://community.seattletimes.nwsources.com/archive/?date=20020610&slug=gawk10>

<sup>57</sup> *What Attracts People to Violent Movies?*, (Mar. 28, 2013), <http://www.sciencedaily.com/releases/2013/03/130328091750.htm>

<sup>58</sup> Jay Coakley, *Violence in Sports: How Does it Affect Our Lives?* In SPORTS IN SOCIETY: ISSUES AND CONTROVERSIES 195-227 (2008) available at [http://highered.mcgraw-hill.com/sites/dl/free/007337654x/673624/Coakley10e\\_ch07.pdf](http://highered.mcgraw-hill.com/sites/dl/free/007337654x/673624/Coakley10e_ch07.pdf)

<sup>59</sup> Sami Yenigun, *Video Game Violence: Why Do We Like It, And What’s It Doing To Us?*, NPR (Feb. 11, 2013), <http://www.npr.org/2013/02/11/171698919/video-game-violence-why-do-we-like-it-and-whats-it-doing-to-us>

<sup>60</sup> Cite oral argument transcript in *Schwarzenegger v. EMA*. <http://joshblackman.com/blog/2011/06/27/instant-analysis-brown-formerly-schwarzenegger-v-ema/>

<sup>61</sup> James Alan Fox & Dr. Jack Levin, *EXTREME KILLING: UNDERSTANDING SERIAL AND MASS MURDER*, 4 (2005). (“Hero worship has always been an integral part of popular culture. Over the decades, we have celebrated those members of society who have reached the pinnacle of success in their fields by honoring them in movies, in documentaries, in magazine profiles, and even on trading cards.”).

<sup>62</sup> Lee Epstein, Christopher M. Parker, & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* (2013) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300572](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572) See also Josh Blackman, *Do Justices Vote For Those*

tend to be more helpful, more willing to allocate resources, and more supportive of policies advocated by members of their own group,” it is not surprising that these relatable tragedies warrant more attention than the overwhelming majority of homicides, many of which are gang, drug, or street violence related.<sup>63</sup> Or, stated differently, people are more likely to fear tragedies that could happen to them (anyone can be in a school or a movie theater), but less likely to fear tragedies that they are less likely to experience (many may have trouble fathoming being involved in drug or gang violence).

Think about the locales of shootings that rise to the national level of consciousness: schools, college campuses, movie theaters, supermarkets, etc. These are places that can be related to, where people can picture themselves being. New Yorker satirist Andy Borowitz sheds some dark humor on the loci of mass shootings, with the headline, “Study: Americans Safe From Gun Violence Except In Schools, Malls, Airports, Movie Theatres, Workplaces, Streets, Own Homes.”<sup>64</sup>

But in contrast, places that most people never visit, on the wrong side of town, don’t warrant as much notice. For example, 46 people were killed in Chicago during a 72-hour period, on the six-month anniversary of Sandy Hook.<sup>65</sup> Yet these deaths garnered very little attention. Or, in the month preceding an October 2013 shooting at Los Angeles International Airport that killed one TSA agent and wounded six, the L.A. Times reported 26 homicides in the area,<sup>66</sup> and 246 murders total in 2013.<sup>67</sup> While the incident at LAX garnered national attention that dominated the news cycle for an entire day—a Google News search at the time for “LAX Shooting” yielded 250,000+ results—we were not able to find any national headlines about these other 220 deaths in the same geographic area, many involving the deaths of young children.

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

What makes this shooting different? Several things. First, it happened in Detroit, a city with a staggeringly high murder rate. Second, the reported gunman had a criminal history, and may have had a longstanding feud with some of the victims. *And, third, it happened in a space where many people can’t imagine themselves: a gambling session in the back room of a barber shop. . . .* Sadly, the relative media ignorance of the shooting tracks with a common theme: Gun crimes often occur in low-income neighborhoods with largely non-white victims, but, from the news, you’d think every shooting put the white and affluent at risk of violence. There’s an obvious reason from a producer’s perspective: They want traffic, or viewers, and think they can get more if more well-off news

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*They Can Relate To?*, Josh Blackman’s Blog (Aug. 7, 2013), <http://joshblackman.com/blog/2013/08/07/do-justices-vote-for-those-they-can-relate-to/>

<sup>63</sup> Lee Epstein, Christopher M. Parker, & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* (2013) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300572](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300572)

<sup>64</sup> Andy Borowitz, *Study: Americans safe from gun violence except in schools, malls, airports, movie theaters, workplaces, streets, own homes*, The New Yorker (Nov. 6, 2013), <http://www.newyorker.com/online/blogs/borowitzreport/2013/11/study-americans-safe-from-gun-violence-except-in-schools-malls-airports-movie-theatres-workplaces-st.html?mobify=0>

<sup>65</sup> Rebecca Leber, *46 People Were Shot In Chicago In Less Than 73 Hours This Weekend*, Think Progress (Jun. 17, 2013), <http://thinkprogress.org/justice/2013/06/17/2165931/>

<sup>66</sup> *Showing 43 homicides in October 2013*, Los Angeles Times (Oct. 2013), <http://projects.latimes.com/homicide/date/2013/10/>

<sup>67</sup> <http://www.lapdonline.org/assets/pdf/cityprof.pdf> (retrieved 12/28/13).

consumers are self-concerned with the story. But it doesn't reflect the reality of gun violence in the United States, where black people are far more likely to be victims of gun homicides compared to their white counterparts.<sup>68</sup>

This is akin to what has been dubbed "Missing White Woman Syndrome,"<sup>69</sup> which shows that the media overwhelmingly covers missing white girls more than missing black girls.<sup>70</sup>

There are many unexplored reasons why some shootings gain so much salience. This analysis begins a discussion on this question.

### III. The Shooting Cycle

The shooting cycle begins. The first stage is **tragedy**. News flash: there is a gunman on the loose in a school, a store, a movie theater, or elsewhere. Initial reports start trickling in, reporting casualties. Another account reports that the gunman has been killed, but not before he inflicted mass carnage. The media descends on the site of the shooting and investigates all aspects of what happened: who was the gunman, why did he do it, how did he gain access to the guns, who knew about his plans, and why did no one stop him. Sadness sets in as the victims are identified, and the national mourning begins. This melancholy gives way to anger.

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

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

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<sup>68</sup> Annie-Rose Strasser, *A Mass Shooting Happened Yesterday But You Didn't Hear Anything About It*, Think Progress (Nov. 8, 2013), <http://thinkprogress.org/justice/2013/11/08/2915581/detroit-barber-shop-shooting/> See also [http://www.huffingtonpost.com/2013/11/11/mass-shooting-detroit\\_n\\_4250706.html](http://www.huffingtonpost.com/2013/11/11/mass-shooting-detroit_n_4250706.html)

<sup>69</sup> Tara McKelvey, *Cleveland abductions: Do white victims get more attention?*, BBC (May 9, 2013), <http://www.bbc.co.uk/news/magazine-22441124>

<sup>70</sup> Sonia Ayanna Stovall, *Why do we seldom hear about missing black children?*, The Denver Post (Feb. 17, 2013), [http://www.denverpost.com/ci\\_22593387/why-do-we-seldom-hear-about-missing-black](http://www.denverpost.com/ci_22593387/why-do-we-seldom-hear-about-missing-black)

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

The fifth stage is **status quo**. By this point, support for change has dwindled even further, as those who perhaps were supportive of gun control reform become suspicious. Urged on by lobbying groups, they ask themselves if the purpose of these legislative moves was to stop the actual crime that occurred, or to advance a broader agenda they may not be comfortable with. Even among median voters, who were amenable to change, support weakens. Raw emotions fade, the movement tapers, and people move on. On each anniversary of the shooting—one month, two months, three months, six months, one year—the memory of the tragedy becomes just that—a memory. Support abates back to levels before the tragedy. The supporters of reform shake their heads, disappointed. They ask themselves, what happened, what changed? For everyone else, life goes on as it did before the tragedy beset. Until the cycle begins again with the next tragedy.

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The pattern that we call the shooting cycle is all too familiar. Others have remarked on the cyclical nature of these tragedies. Professor Robert Spitzer, in *THE POLITICS OF GUN CONTROL*, contends that gun politics follows a “cycle of outrage, action, and reaction.”<sup>71</sup> Professor Kristin Goss has written, in “the cycle, a high-profile shooting outrages regular Americans; they act by proposing stricter gun controls; and this action causes gun rights supporters to react by, among other tactics, suggesting that gun registration is just the first step down the slippery slope to fascism or totalitarianism.”<sup>72</sup> The Wall Street Journal also characterizes the cycle:

“Someday soon, we are likely to awake to news of yet another rampage shooting, one that perhaps will rival the infamous events at Columbine, Virginia Tech, Aurora and Newtown. As unknowable as the when and who and where of the next tragedy is the certainty that there will be one, and of what will follow: The tense initial hours as we watch the body count tick higher. The ashen-faced news anchors with pictures of stricken families. Stories and images of the fatal minutes. Reports on the shooter’s journals and manifestos. A weary speech from the president. Debates about guns and mental health . . . The perverse truth is that this senselessness is just the point of mass shootings: It is the means by which the perpetrator seeks to make us feel his hatred.”<sup>73</sup>

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<sup>71</sup> ROBERT SPITZER, *THE POLITICS OF GUN CONTROL* (2011).

<sup>72</sup> Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 *Fordham L. Rev.* 681 (2004).

<sup>73</sup> Ari N. Schulman, *What Mass Killers Want—And How to Stop Them*, *Wall Street Journal* (Nov. 8, 2013), <http://online.wsj.com/news/articles/SB10001424052702303309504579181702252120052>

Ed Krayewski writes, “Tragedies like these follow a familiar cycle. Because they are disruptive and out-of-the-ordinary, they receive an abundance of media coverage, which in turn gives life to stalled agendas while birthing new ones. The president addresses the nation, articulating feelings many people share. We mourn the victims, even though they are strangers to us. We ask why it happened, and what can we do to keep it from happening again. We have been doing all of this for a very long time.”<sup>74</sup> Others have written about a similar pattern in the wake of a terrorist attack.<sup>75</sup> An unfortunately accurate headline from the satire newspaper, *The Onion*, sardonically characterizes this dynamic: “Let's Just Go Ahead And Assume We've Learned The Lessons Of The Gabrielle Giffords Shooting.”<sup>76</sup>

#### IV. Understanding the Shooting Cycle

There are two primary concepts that help explain shifts during the shooting cycle: *emotional capture* and *regression to the mean*. Emotional capture is a term we use to describe the change in emotions following a tragedy, and the concomitant shift in policy views during this time towards stricter gun laws. But, the emotional capture is limited by the societal regression to the mean. Regression to the mean refers to the reversion to the ex ante status quo, of how people viewed certain policy issues before the tragedy.

To use an example, gun control legislation that could not be passed prior to the shooting, and that would not be passed after society regresses to the status quo, can only be enacted during the time of emotional capture. During this period, time is of the essence, and engaged politicians and interest groups supporting the law must move as quickly as possible before emotions subside.

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<sup>74</sup> Ed Krayewski, *Life After the Aurora Shooting*, reason.com (Jul. 25, 2012), <http://reason.com/archives/2012/07/25/life-after-the-aurora-shooting>

<sup>75</sup> Laura Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (2008). “*This pattern is a common one. In the aftermath of a terrorist attack, the immediate assumption is that the incident occurred because the state lacked the information and authority necessary to avert it. The executive branch therefore seeks broader powers. And the political stakes are high: legislators are loath to be seen as indifferent to the latest atrocity or, worse, as soft on terror. Accordingly, the legislature grants the executive broader authorities, often under abbreviated procedures and without careful inquiry into what went wrong. Government officials claim that the new powers will be applied only to terrorists. To make the most extreme provisions more palatable, the legislature appends sunset clauses. But in the rush to pass new measures, legislators rarely incorporate sufficient oversight authorities. New powers end up being applied to nonterrorists – often becoming part of ordinary criminal law. And temporary provisions rarely remain so – instead, they become a baseline on which future measures are built. At each point at which the legislature would otherwise be expected to push back – at the introduction of the measures, at the renewal of the temporary provisions, and in the exercise of oversight – its ability to do so is limited.*”)

<sup>76</sup> Ellen Crawford-Price, *Let's Just Go Ahead And Assume We've Learned The Lessons Of The Gabrielle Giffords Shooting*, *The Onion* (May 24, 2011), available at <http://www.theonion.com/articles/lets-just-go-ahead-and-assume-weve-learned-the-les,20525/> (“On Jan. 8, 2011, we as a society were shocked and dismayed when 19 people, including Rep. Gabrielle Giffords, a Democratic congresswoman from Arizona’s 8th District, were shot during a public meeting outside a local supermarket. Six people were killed and Rep. Giffords suffered a near-fatal head wound. In the wake of this national tragedy, there seemed to be a clarion call to have an open dialogue about gun control, a thoughtful conversation about the way this country treats its mentally ill, and a long overdue discussion about the consequences of overly inflammatory political rhetoric. *Well, seeing as I haven't heard so much as a word about any of those topics in the past three months, I'm going to go ahead and assume that at some point we thoroughly explored those complex issues, resolved them, and are now living our lives based on the lessons we learned from the in-depth conversations I assume we had.*”) (emphasis added).

Opponents of the laws stall, and wait for sentiments to return to their pre-shooting state. Looking at public opinion polling over the last twenty years reflects both of these phenomena—emotional capture, followed by regression to the mean, after mass shootings.

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

To measure the shooting cycle, we produced a graph that plots the percentage of Americans that support stricter gun control laws from 1993 through 2003. We produced this graph by compiling the polling data over the last two decades from five leading polling organizations, that each framed the question about whether there should be stricter gun laws in roughly the same fashion: NBC News/Wall Street Journal,<sup>77</sup> CNN/ORC,<sup>78</sup> ABC News/Washington Post,<sup>79</sup> and Gallup.<sup>80</sup> PewResearch framed the question slightly differently, in terms of controlling gun ownership,<sup>81</sup> but we deemed it substantially similar to include it in the same graph. On the graph, we highlighted five of the highest profile mass shootings that occurred between 1993 and 2013: Columbine, Virginia Tech, Tucson, Aurora, and Newtown. Finally, we added an aggregate trend line that averages the polling data at each date along the graph to show the general direction of American sentiments.

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[http://msnbcmedia.msn.com/i/MSNBC/Sections/A\\_Politics/\\_Today\\_Stories\\_Teases/13528%20December%20NBC-WSJ%20Final%20Filled-InCORRECTED.pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/A_Politics/_Today_Stories_Teases/13528%20December%20NBC-WSJ%20Final%20Filled-InCORRECTED.pdf) (“In general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now?”).

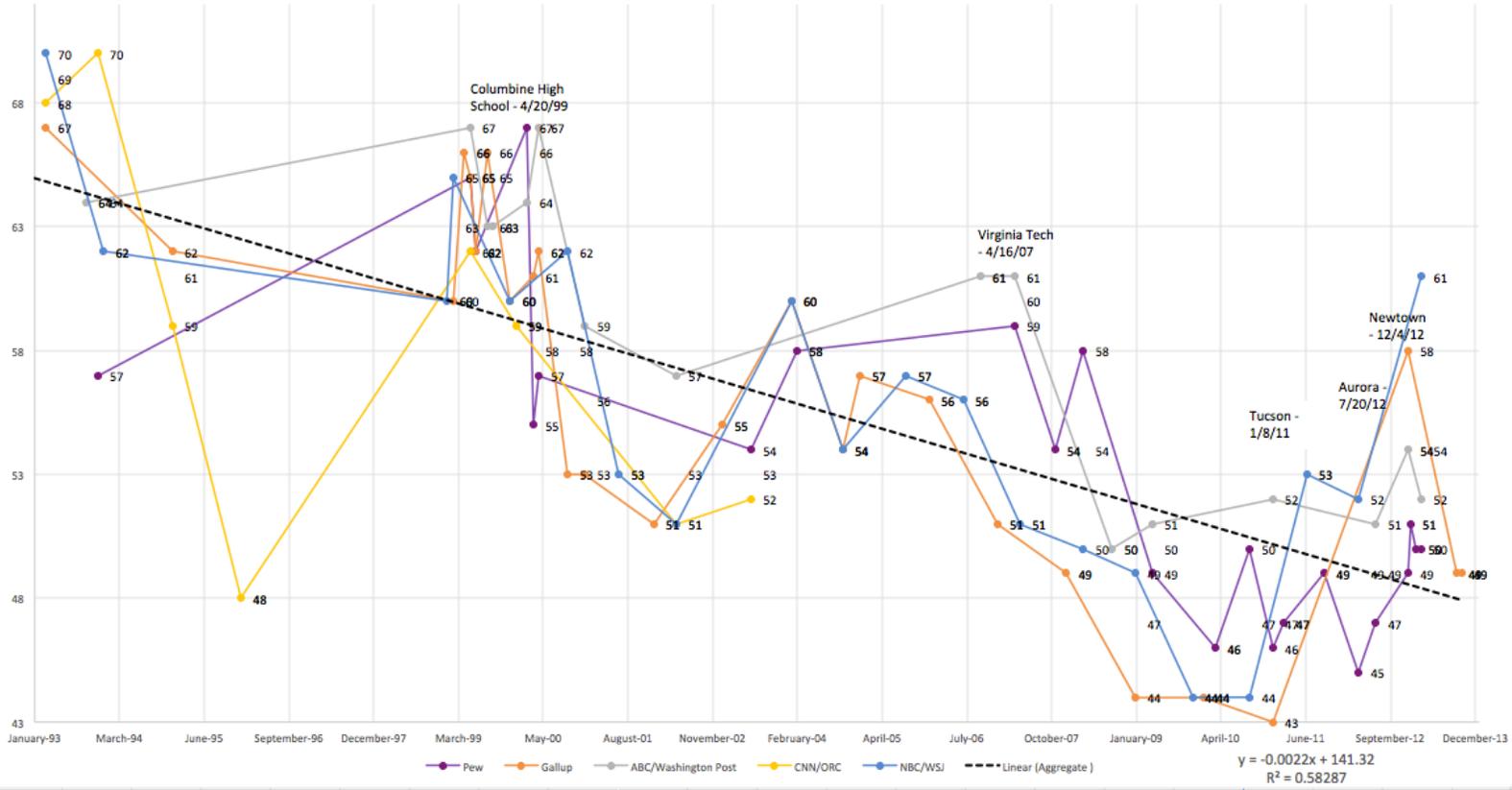
<sup>78</sup> <http://i2.cdn.turner.com/cnn/2013/images/12/04/cnn.poll.gun.control.pdf> (“Do you favor or oppose stricter gun control laws?”).

<sup>79</sup> <http://www.langerresearch.com/uploads/1147a2GunControl.pdf> (“Do you favor or oppose stricter gun control laws in this country? Do you feel that way strongly or somewhat? “).

<sup>80</sup> <http://www.gallup.com/poll/1645/guns.aspx#1> (“In general, do you feel that the laws covering the sale of firearms should be made more strict, less strict, or kept as they are now?”).

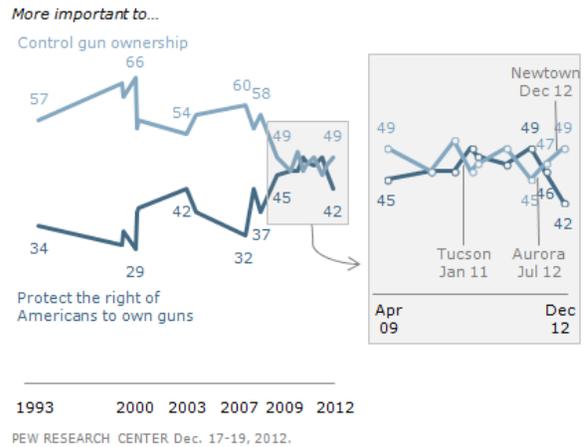
<sup>81</sup> <http://www.people-press.org/files/legacy-pdf/5-23-13%20Gun%20Policy%20Release.pdf> (“What do you think is more important – to protect the right of Americans to own guns, OR to control gun ownership?”).

### Support for Stricter Gun Laws (1993-2013)



By plotting all of these data points, a picture of how Americans react to gun violence becomes clear. First, the trend line in favor of stricter gun support is decreasing, from a high of roughly 64% in 1993 to roughly 48% in late 2013. In other words, over time, Americans have become less supportive of stricter gun laws. The aggregate line has an r-squared value of .58.<sup>82</sup> The R-squared value shows how well the data points fit a regression line. Specifically, it indicates what percentage of the data's variation is explained by the linear model. In this case, 58% of the variation is explained by the regression line. This demonstrates a moderately good fit for the data.<sup>83</sup> In other words, the decreasing trend towards less support for gun laws explains the statistical changes in American sentiments. The inflection point came in approximately April 2010 when a PewResearch poll found that Americans more strongly favored gun rights (49%) than restricting gun ownership (45%).<sup>84</sup> This decreasing support for gun laws provides a baseline against which to measure spikes in support following shoots (emotional capture), following by a dip after that emotion subsides (regression to the mean).

**Views of Gun Control: 1993-2012**



## B. Emotional Capture

We use the phrase emotional capture to refer to the shift in policy preferences following a mass shooting. Emotional capture applies to the occurrence of any tragic, unexpected event that results in the loss of life. Our data demonstrate that in the aftermath of a mass shooting that captures the national consciousness, such as Columbine or Virginia Tech, there is a spike in

<sup>82</sup> Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 Wash. U. L.Q. 653, 736 (2003) (“The definition of r-squared is the square of r; r is often referred to as the “coefficient of correlation,” and is a widely used statistic for describing the relationship between two variables. See *The Economist Numbers Guide: The Essentials of Business Numeracy* 111 (John Wiley & Sons, Inc. 1997). The value of r ranges from -1.00 to 1.00; an r measurement of 1.00 indicates a perfect positive relationship whereas 0.00 indicates the complete absence of a relationship. Id. The square of r, “r-squared,” also known as the “coefficient of determination,” ranges from 0 to 1.00 and indicates how much of the change in a dependent variable is explained by the change in a second, independent variable. Id. However, r-squared does not necessarily indicate a causal relationship between the two variables. Both variables may themselves be linked to a third, unknown variable which influences changes in both.”).

<sup>83</sup> Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 Wash. U. L.Q. 653, 736 (2003) (“An r value of 0.5 is generally regarded as a moderate indicator of a relationship between two variables, whereas an r value of 0.75 or higher is generally regarded as a strong indicator of a relationship. See FRED PYRCZAK, *MAKING SENSE OF STATISTICS* 55 (2001). An r of 0.5 equals an r-squared of 0.25; expressed as a percent, the r-squared value is 25%. That is, 25% of the variance in one variable is accounted for by the variance of the other variable. An r of 0.75, which equals an r-squared of 0.5625, indicates that 56.25% of the variance of one variable is accounted for by the variance of another variable. While there is no simple method of determining how high r-squared must be for the fit to be satisfactory, an r-squared of .50 (i.e., an r of .71) or higher may generally be considered a good indicator of a relationship between two variables.”).

<sup>84</sup> Mark Blumenthal, *Gun Control Polls Show Longterm Decline In Support, Despite Columbine Bump*, Huffington Post (Jul. 20, 2012), [http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting\\_n\\_1690169.html](http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting_n_1690169.html)

support for stricter gun control laws. The most pronounced jump is in the two-year span from January 2011 to December 2012, which included Tucson, Aurora, and Newtown.

A few examples will demonstrate this spike. The tragic shooting at Columbine High School was the most watched public interest story of any story in 1999.<sup>85</sup> 68% of Americans polled reported that they followed the story very closely.<sup>86</sup> A Gallup Poll taken shortly after the shooting, showed 66% of Americans said the sale of firearms should be restricted, a six point increase from earlier that year.<sup>87</sup> A PewResearch poll found that 65% of Americans favored new restrictions on owning firearms—an eight percent increase since 1993.<sup>88</sup>

A CBS/New York Times poll taken in January 20, 2011 in the aftermath of the shooting in Tucson, Arizona showed “that Americans have moved slightly in favor of stricter laws in light of the incident.”<sup>89</sup> The percentage of Americans who wanted stricter gun laws increased from 40% in April 2010 to 46% in January 2011.<sup>90</sup> An ABC News-Yahoo survey showed that 55% of respondents were optimistic that Congress would be able to pass gun control legislation, up seven points from a survey taken before the shooting.<sup>91</sup> Further, support for assault weapon ban increased from 54% in 2009 to 63% in 2011.

But not all mass shootings result in spikes. For example, a poll taken ten days after the shooting at a movie theater in Aurora, Colorado revealed no significant change in public views on gun control and gun rights. On July 30, 2012, “47% say it is more important to control gun ownership, while 46% say it is more important to protect the rights of Americans to own guns. That is virtually unchanged from a survey earlier this year in April, when 45% prioritized gun control and 49% gun rights.”<sup>92</sup>

What explains the spikes? In the immediate aftermath of a shootings, there are no new revelations about the effectiveness of gun control laws (these studies have been debated for decades). There is no police report showing that if stricter certain gun control laws had been in place, the tragedy would have been prevented (often police reports show that the guns were legally obtained). So what changes to result in the spike? Primarily, the emotional outburst resulting from reflecting on the deaths of the victims. It is the force that tugs at our hearts after seeing innocent lives taken so viciously. Some who in the past moderately supported stricter gun laws now strongly support it, while some who in the past moderately opposed stricter gun laws will now moderately support them. Many move up in their support of gun laws. This is the emotional capture.

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<sup>85</sup> *Columbine Shooting Biggest News Draw of 1999*, Pew Research (Dec. 28, 1999), <http://www.people-press.org/1999/12/28/columbine-shooting-biggest-news-draw-of-1999/>

<sup>86</sup> *Columbine Shooting Biggest News Draw of 1999*, Pew Research (Dec. 28, 1999), <http://www.people-press.org/1999/12/28/columbine-shooting-biggest-news-draw-of-1999/>

<sup>87</sup> Jeffrey M. Jones, *Record-Low 26% in U.S. Favor Handgun Ban*, Gallup (Oct. 26, 2011), <http://www.gallup.com/poll/150341/record-low-favor-handgun-ban.aspx>

<sup>88</sup> *Bradley Boxes Out Political Center*, Pew Research (May 20, 1999), <http://www.people-press.org/1999/05/20/bradley-boxes-out-political-center/>

<sup>89</sup> Lucy Madison, *Poll: Americans Remain Split on Gun Control*, CBS News (Jan. 20, 2011), <http://www.cbsnews.com/news/poll-americans-remain-split-on-gun-control/>

<sup>90</sup> *CBS News/New York Times Poll: The Economy, the Budget Deficit and Gun Control*, CBS News/New York Times (Jan. 20, 2011), [http://www.cbsnews.com/htdocs/pdf/Jan11\\_Econ.pdf](http://www.cbsnews.com/htdocs/pdf/Jan11_Econ.pdf)

<sup>91</sup> Dan Balz & Jon Cohen, *Poll shows high marks for Obama on Tucson, low regard for political dialogue*, Washington Post (Jan. 18, 2011), [http://www.washingtonpost.com/wp-dyn/content/article/2011/01/17/AR2011011703262\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2011/01/17/AR2011011703262_pf.html)

<sup>92</sup> *Views on Gun Laws Unchanged After Aurora Shooting*, Pew Research (Jul. 30, 2012), <http://www.people-press.org/2012/07/30/views-on-gun-laws-unchanged-after-aurora-shooting/>

We note that the dynamic of emotional capture is not only at play in the context of gun violence. Much has been written about these types of reactions following a terrorist attack, such as 9/11, and the resulting legislative response. Professor Donohue has written that in the aftermath of a terrorist attack, “Moral outrage and emotional fervor reach a crescendo . . . [and] the newsworthiness of the types of events . . . ensures wide publicity.”<sup>93</sup> The people, fearful of what happened, call on politicians to do something to keep them safe. With this heightened attention, “political leaders initiate media campaigns to demonstrate that they are doing *something*.”<sup>94</sup> Politicians always say, we have to do something, we can’t do nothing.

Following the attacks on September 11th, the Bush Administration “sought significantly broader powers and insisted on *haste*.”<sup>95</sup> Part of the haste no doubt could be attributed to wanting to take quick actions to stop imminent terrorist attacks. But, the exigencies were also based on the notion that the President had to strike while the iron was hot, and the memories of the victims of 9/11 were still raw, to minimize opposition to what would come. The Patriot Act was introduced in the House of Representatives on October 24, 2001, and passed the same day by a vote of 357 to 66. On October 25, 2001, the Act passed the Senate by a vote of 98 to 1. The President signed it into law the next day.<sup>96</sup> Had the bill been passed one, two, or maybe three months later, the margin of victory would have likely been quite different.

An inevitable consequence of passing legislation during emotional capture is mission creep. That is, once the people are emotionally committed to some sort of change, those in power can subtly add issues to the agenda. As former White House Chief of Staff Rahm Emanuel famously said, “Rule one: Never allow a crisis to go to waste. They are opportunities to do big things.”<sup>97</sup> The context of this quotation is often lost. According to the New York Times, Emanuel was addressing “The idea of turning the auto industry’s crisis into a chance to enact changes with energy and environmental benefits.”<sup>98</sup> In other words, use momentum to legislate around an emergency of limited scope (the auto crisis) to address tangentially related goals that would otherwise lack support (the environment and energy reform). Elsewhere, Emanuel elaborated. “Things that we had postponed for too long, that were long-term, are now immediate and must be dealt with. This crisis provides the opportunity for us to do things that you could not do

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<sup>93</sup> LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* 12-13 (2008).

<sup>94</sup> LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* 12-13 (2008).

<sup>95</sup> Professor Laura Donohue captures the haste of this legislative barrage. LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* 1-2 (2008).

(“In the Senate, the administration’s bill bypassed committee markup and went straight behind closed doors. The House held only one hearing, at which Attorney General Ashcroft served as the sole witness. At 3:45 a.m. on October 24, the morning of the vote, the final bill reached print. The 342-page document amended fifteen federal statutes.4 Legislators, many of whom were unable even to read the text, were given only the opportunity to vote thumbs up or thumbs down - with no chance of further amendment. Dennis Hastert, the Speaker of the House, ruled out of order the one legislator who tried to debate parts of the act. Nevertheless, the legislation commanded nearly 80 percent of the vote: 337 Representatives voted for the measure, and only 79 objected. The numbers in the Senate were even more extreme: 96 cast their vote in favor, whereas only i - Russ Feingold, a Democrat from Wisconsin.”).

<sup>96</sup> Jeremy Peters & Peter Baker, *Months After Massacre, Obama Seeks to Regain Momentum on Gun Laws*, New York Times (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/us/politics/obama-makes-impassioned-plea-for-gun-control.html>

<sup>97</sup> Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, New York Times (Nov. 9, 2008), <http://www.nytimes.com/2008/11/10/us/politics/10obama.html?pagewanted=all>

<sup>98</sup> Jeff Zeleny, *Obama Weighs Quick Undoing of Bush Policy*, New York Times (Nov. 9, 2008), <http://www.nytimes.com/2008/11/10/us/politics/10obama.html?pagewanted=all>

before.”<sup>99</sup> To this view, crises give politicians the opportunity to accomplish things that have been rejected many times before (that’s what waiting “long-term” means in Washington), but now are “immediate and must be dealt with.”

While Professors Eric Posner and Adrian Vermeule suggest that making decision based on emotions, such as fear, after tragedies, can cause people to “discard old assumptions and complacent ways of thinking and to address problems with new vigor,”<sup>100</sup> it is more often the case that old ideas are just recycled. Many of these proposals may have been previously rejected, or at the least would be nonstarters without the emotional capture. But now without opposition, they are in play. Professor Donohue observed that in a “heated atmosphere” after a terrorist attack, “measures previously rejected, or considered unnecessary, often pass.”<sup>101</sup> For example, “efforts after the Oklahoma City bombing in 1995 to expand the FBI’s investigative powers died—only to be successfully revived after 9/11.”<sup>102</sup> Further, “roving wiretaps, rejected in the 1996 Antiterrorism and Effective Death Penalty Act, were incorporated into the 2001 USA PATRIOT Act.”<sup>103</sup>

In the aftermath of any mass shooting, the perennially introduced, and perennially defeated assault weapons bill—which expired in 2004—is brought back to the fore of the debate. Representative Carolyn McCarthy has introduced an assault weapons ban in the House in 2003,<sup>104</sup> 2005,<sup>105</sup> 2007,<sup>106</sup> not one of which even made it past committee. Gallup polling shows support for a ban on assault weapons dipped from 57% in 1996, 59% in 2000, 50% in 2004 to 44% in 2012.<sup>107</sup> The Senate rejected the Protection of Lawful Commerce in Arms Act in 2004, after Senator Dianne Feinstein attached a renewal of the assault weapons ban, and passed it in 2005 without the amendment. In January 2013 after Newtown, Senator Feinstein reintroduced the bill.<sup>108</sup> It would be voted down by a vote of 60 to 40 in April 2013.<sup>109</sup>

Professors Posner and Vermeule argue that governing based on fear, after a terrorist attack, is not necessarily a bad thing.<sup>110</sup> In fact, they argue that a key aspect of rational decision-making—deliberation—may in fact be a negative. “Fear provides motivation. Where a fully

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<sup>99</sup> Gerald Seib, *In Crisis, Opportunity for Obama*, Wall Street Journal (Nov. 21, 2008), <http://online.wsj.com/news/articles/SB122721278056345271>

<sup>100</sup> ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 63 (2007).

<sup>101</sup> LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* 12-13 (2008).

<sup>102</sup> LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* 12-13 (2008).

<sup>103</sup> LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM* 12-13 (2008).

<sup>104</sup> H.R. 2038, 108<sup>th</sup> Cong. (2003).

<sup>105</sup> H.R. 1312, 109<sup>th</sup> Cong. (2005).

<sup>106</sup> H.R. 1022, 110<sup>th</sup> Cong. (2007).

<sup>107</sup> Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, Gallup (Dec. 27, 2012), <http://www.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx>

<sup>108</sup> *Lawmakers Renew Call to Restore Federal Assault Weapons Ban Following Newtown School Massacre*, CBS New York (Dec. 16, 2012), <http://newyork.cbslocal.com/2012/12/16/lawmakers-renew-call-to-restore-federal-assault-weapons-ban-following-newtown-school-massacre/>

<sup>109</sup> Richard Simon, *Senate votes down Feinstein’s assault weapons ban*, Los Angeles Times (Apr. 17, 2013), <http://www.latimes.com/news/politics/la-pn-dianne-feinstein-assault-weapons-vote-20130417,0,5349684.story>

<sup>110</sup> ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 61 (2007). (“The civil libertarian view depends heavily on a particular theory of fear, a theory that implies that fear interferes with cognition and judgment. However, fear is a complex emotion, and generalizing about its relationship to cognition is hazardous.”). ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 59 (2007) (“fear does not play an unambiguously negative role in decisionmaking”).

rational person spends time deliberating, the fearful person acts quickly. Both of these factors suggest that fear can play a constructive role during emergencies.”<sup>111</sup> To this view, deliberation and time to consider laws is a negative, not a positive. Perhaps a different approach to responding to tragedies is that of Colorado. Nearly five months after the shooting in Aurora, Colorado Governor John Hickenlooper noted that enough time had elapsed to assess the topic of gun regulations with clarity: “I wanted to have at least a couple of months off after the shooting in Aurora to let people process and grieve and get a little space, but it is, I think, now is the time is right.”<sup>112</sup> In a surreal twist of ironic timing, the very next day, the Sandy Hook shooting took place.

### C. Regression to the Mean

To comprehend the drops in support for stricter gun control laws following the post-shooting-spike, we have to understand the concept of *regression to the mean*. In statistics, the concept of regression to the mean holds that “whenever the correlation between two scores is imperfect, there will be regression to the mean.”<sup>113</sup> Stated more simply, “extremes are exceptions—over time, results return to the norm.”<sup>114</sup> For example, students who take an examination in a class will fall naturally along a standard bell curve. There will be a few students at the top of the curve, a few students at the bottom, and the rest clustered somewhere along the middle. If a student consistently performs in the middle of the curve, and then suddenly scores in the 90th percentile, should we expect the student to perform that high again on the following exam? Probably not. That surge was likely an aberration, and the student will usually return to his or her usual average score (mean) on the middle of the bell curve—or will regress to the average score. This is the concept of regression to the mean.

To use another example, think of an average athlete who has a sudden breakout performance, but after some time he or she returns to previous mediocrity.<sup>115</sup> Since athletic “performances at different times are imperfectly correlated,” it is “due to regression alone [that] we can expect an extraordinarily good performance to be followed, on the average, by a somewhat less extraordinary performance.”<sup>116</sup> In other words, if an athlete is usually mediocre, and performs very well for some brief period, that brief period is an outlier, and we can expect a return to normalcy at some point soon.

This simple concept can help explain the shooting cycle. The spike in support for gun control after a tragedy was an aberration spurred largely by the emotional capture of the event. Once that capture wears off, and the emotions fade, society regresses to the mean to where it was before the tragedy struck.

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<sup>111</sup>ERIC POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 62 (2007).

<sup>112</sup> Ivan Moreno & Kristen Wyatt, *Governor Hickenlooper: ‘The Time Is Right’ To Talk Gun Laws*, Huffington Post (Dec. 13, 2012), [http://www.huffingtonpost.com/2012/12/13/governor-hickenlooper-say\\_n\\_2294609.html](http://www.huffingtonpost.com/2012/12/13/governor-hickenlooper-say_n_2294609.html)

<sup>113</sup>DANIEL KAHNEMAN, *THINKING, FAST, AND SLOW* 181 (2011).

<sup>114</sup> Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. Colo. L. Rev. 649, 687 (2006).

<sup>115</sup> Nate Kornell, *Why is Jeremy Lin so Good?*, Psychology Today (Feb. 15, 2012), <http://www.psychologytoday.com/blog/everybody-is-stupid-except-you/201202/why-is-jeremy-lin-so-good> Josh Blackman, *Jeremy Lin and Regression to the Mean*, Josh Blackman’s Blog (Feb. 9, 2012), <http://joshblackman.com/blog/2012/02/09/jeremy-lin-and-regression-to-the-mean/>

<sup>116</sup> Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. Colo. L. Rev. 649, 687 (2006).

Scholars have observed this trend following previous mass shootings. For example, Professor Kristin Goss wrote that the “aftermath of Columbine looked a lot like the aftermath of many other high profile shootings in American history: collective outrage, followed by a momentary flurry of unorganized calls and letters and donations from thousands of individuals, and then a quick return to the status quo.”<sup>117</sup> Polling found that the “post-Columbine bump had faded about a year later, and support for stricter gun laws remained roughly constant over the next eight years.”<sup>118</sup> Similarly, the shooting in Aurora “produced a brief bump in support for stricter gun laws, but that new support had eroded a year later and ultimately gave way to a longer-term decline.”<sup>119</sup>

President Obama observed this “pull of our collective attention,” as he labeled it, after the shooting in Aurora, Colorado. “When there’s an extraordinarily heartbreaking tragedy like the one we saw, there’s always an outcry immediately after for action. There’s talk of new reforms. There’s talk of legislation. And too often those efforts are defeated by politics and by lobbying and eventually by the *pull of our collective attention elsewhere*.”<sup>120</sup> While politics and lobbying certainly account for a significant part of the change, this “pull” reflects an underlying return to what people are actually concerned about, rather than tragedies that gin up emotions.

A CNN poll, which measures the intensity of support for stricter gun laws following Newtown, illustrates this regression:<sup>121</sup>

	January 14-15, 2013	April 5-7, 2013	November 18-20, 2013
Strongly Favor (“A”)	37%	36%	31%
Moderately Favor (“B”)	18%	17%	18%
Moderately Oppose (“C”)	17%	16%	18%
Strongly Oppose (“D”)	27%	29%	32%
No Opinion	1%	2%	1%

To build on the example used earlier of the grade distributions on a normal distribution curve, let’s assign grades to people based on their level of support for stricter gun laws (of course, we offer no normative judgment on the respective positions, but use these grades for simplicity’s sake): an “A” to those who strongly favor them, a “B” those who moderately favor them, a “C” to those who moderately oppose them, and a “D” to those who strongly oppose them. First, let’s establish the ex ante status quo before Newtown. Unfortunately, CNN did not offer polling data of the ex-ante status quo before Newtown. But, we can assume that there was a general spike in the numbers from December to January, based on the general national trends discussed earlier. And the share of Bs and Cs who are moderate on the issues remain roughly the same over time. So presumably, before Newtown there were fewer than 37% As, and more than 27% Ds.

However, after Newtown, the composition shifts. Suddenly, on January 14, 2013, there is a surge of A students. Many who were previously B students (moderately favored gun control

<sup>117</sup> KRISTEN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL* 1-2 (2008).

<sup>118</sup> Mark Blumenthal, *Gun Control Polls Show Longterm Decline in Support, Despite Columbine Bump*, Huffington Post (Jul. 20, 2012), [http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting\\_n\\_1690169.html](http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting_n_1690169.html)

<sup>119</sup> Mark Blumenthal, *Gun Control Polls Show Longterm Decline in Support, Despite Columbine Bump*, Huffington Post (Jul. 20, 2012), [http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting\\_n\\_1690169.html](http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting_n_1690169.html)

<sup>120</sup> Darren Samuelsohn, *Obama: AK-47s belong on battlefield, not streets*, Politico (Jul. 25, 2012), <http://www.politico.com/politico44/2012/07/obama-aks-belong-on-battlefield-not-streets-130141.html>

<sup>121</sup> <http://i2.cdn.turner.com/cnn/2013/images/12/04/cnn.poll.gun.control.pdf>

laws) instantly become more engaged, and jump up on the curve. A smaller number of C students (who moderately opposed the laws) now make a B, and moderately favor new laws. Even a small number of D students break from their old habits, and pull a C, moderately, but not strongly opposing gun laws. The upward progression of everyone is the only way to explain how the number of Bs and Cs throughout the entire year remains the same. The composition is now 37% A, 18% B, 17% C, and 27% D. This surge to the top of the curve may seem impressive to the novice teacher, and view it as a mandate that there are many more A students that he or she thought before. But the veteran grader knows what is going on. This surge is a temporary aberration. Regression to the mean is inevitable. The B, C, and D students didn't suddenly learn something new to change their views, or have a fundamental shift in their views. This change was spurred by emotion.

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

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

In society, there are blocks of people who vigorously favor stricter gun laws, and those who vigorously oppose them. These blocks at either end of the curve are likely fairly fixed in their ways. Emotional capture, however, plays on those in the middle. There are those who may moderately favor gun control laws, but after seeing innocent children killed at Newtown, are captured by the emotions, and begin to strongly favor those laws. There are those who moderately opposed stricter gun laws, who after seeing the tragedy unfold at Sandy Hook, tepidly endorse stricter gun laws. These people may be opposed to many proposed laws, but will endorse more moderate provisions. There may even be those who strongly opposed gun laws, who after the shooting, soften their stance, and now only moderately oppose gun control. They may not support any gun control laws, but will not vociferously oppose them.

With time, people turn to the priorities that existed before the tragedy. The editor and publisher of the non-partisan Rothenberg Political Report commented on this shift: "So much of the support for gun control is emotional, following the Newtown tragedy." He added, "The longer you get away from there, people start thinking of other issues. They start thinking about terrorism or jobs or immigration, and not surprisingly, then some of the momentum behind gun control starts to fade."<sup>122</sup> Americans did not become more callous, or heartless in this time. These subtle changes, in just a few months, are evidence of the regression to the mean.

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<sup>122</sup> Susan Page, *USA TODAY Poll: Public support for gun control ebbs*, USA TODAY (Apr. 23, 2013), <http://www.usatoday.com/story/news/politics/2013/04/22/usa-today-poll-finds-support-for-gun-control-ebbs-backing-for-immigration-bill-strong/2103419/>

We omit in our discussion the role that the National Rifle Association plays in pushing society back to the mean—though this influence is very strong. We focus solely on the people’s reactions, and the related government’s decision to move quickly, in order to stem the tide of waning emotions. We concede that this tells an incomplete portion of the narrative, yet the movement of popular opinion independent from the lobby groups has been under-discussed in the academic literature, and in contemporary reports. The conventional account is that after a shooting, the NRA uses its legislative clout and influence on Congress to stop reform. It is often assumed that it is the NRA’s influence that changes public opinion. But this only tells part of the story. What is often ignored is that a broad shift in the public opinion may in fact impact what Congress and the NRA does. There is a feedback loop. Speaking of the drop in support for these laws, Professor Adam Winkler observed, “Lawmakers in Congress see these numbers—especially senators in competitive districts or those worried about a primary challenge from the right.”<sup>123</sup> When the percentages of Americans who strongly support these laws dips below the percentage of Americans who strongly opposes them, the debate becomes much clearer, than simply labeling the NRA as the sole reason why these changes occur. Our analysis only begins the study of this question.

#### **D. The Mean is Declining**

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

According to a two-decade long Gallup survey, the percentage of Americans who want to keep gun laws as they are now are—in other words, maintain the status quo—has been trending upward. The percentage of Americans who want to make gun laws less strict has been trending, slightly upward, with the exception of several spikes down that can be correlated with mass shootings (the inverse of the spikes up for “more strict” laws). But the percentage of people who want to have stricter gun laws has been trending downward. These numbers show a cultural trend towards more permissive gun laws, with only mere blips in the aftermaths of mass shootings that reach the collective consciousness of Americans. After these spikes, views regress towards the mean, with less than a majority seeking change, and more seek to at least maintain the status quo.<sup>124</sup> There is a decreasing mean, after each mass shooting, for stronger gun laws.

When viewed in context, this trend is even more significant. In 1994, the Assault Weapons Ban was enacted, representing the modern-day apogee of federal gun control laws. Yet,

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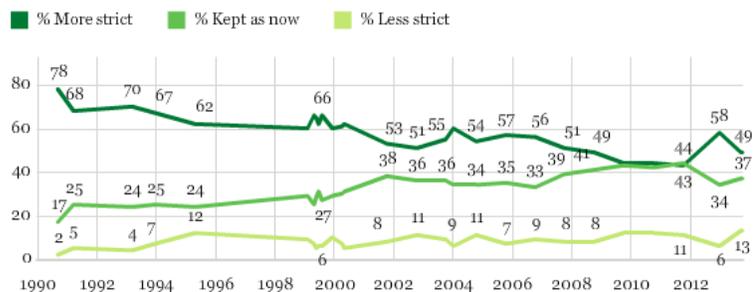
<sup>123</sup> Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 1, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>

<sup>124</sup> *Guns*, Gallup (2013), <http://www.gallup.com/poll/1645/guns.aspx#1>

in the years after 1994, support for stricter gun control laws continued to decrease. In 2004, the Assault Weapons Ban expired, bringing us to the current level of federal gun laws. Even with much more lax gun laws, there was no plateau, suggesting a sweet-spot was reached, or reversal of trends. In fact, support for stricter gun control laws continued to drop. In context, even though a significant gun control law expired in 2004, Americans were still not content, and wanted even more relaxed gun laws. And preliminary data in 2013 shows that following the defeat of federal laws introduced following Newtown, Americans still want yet fewer gun laws. This trend has continued despite successful, and unsuccessful efforts to pass federal gun control legislation.

These numbers are relevant for those seeking to implement gun control laws. There is a short window, during the spike, where support for new laws is stronger than it was before. However, if laws are not passed quickly, once emotions fade, their chances of success are even *lower* than they were before. This last point may be somewhat surprising, but it help explains how support for gun control laws seems to fade after each mass shooting. Desensitized as a society, the threshold for moral outrage becomes higher. Less support for gun control laws after tragedies is the *normal* reaction to mass shootings. Not the other way around.

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



GALLUP

## V. One Year From Newtown

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

### A. Gun Control Before Newtown

Before we begin our discussion of Newtown, we have to establish the *ex ante* status quo baseline. Before December 14, 2012, federal gun control legislation was not on the national radar. During his first term in office, President Obama failed to make gun control part of his agenda, much to the consternation of many gun-control advocates. Following the shooting in Tucson,

President Obama “mentioned gun safety only in passing.”<sup>125</sup> Even following the shooting in Aurora, Colorado in July, 2012, neither President Obama, nor his opponent Governor Mitt Romney “push[ed] new laws . . . to prevent similar attacks.”<sup>126</sup> This inaction disappointed gun control advocates, such as then-New York City mayor, Michael Bloomberg: “Soothing words are nice, but maybe it's time that the two people who want to be president of the United States stand up and tell us what they are going to do about it, because this is obviously a problem across the country.”<sup>127</sup> The topic of gun control was notoriously absent from the 2012 election—barely one month before Newtown.

But after Newtown, and before he was even inaugurated, the President suddenly made guns the centerpiece of his second term. Shortly before he read his speech to mark the tragedy, “Obama convened a group of top aides in the Oval Office and informed them that passing gun legislation would now take priority in his already-cluttered second-term agenda.”<sup>128</sup>

## **B. The Tragedy**

On the morning of December 14, 2012, Adam Lanza entered Sandy Hook Elementary School in Newtown, Connecticut. Using a Bushmaster AR-15, he shot and killed 20 first graders and six female members of the school’s staff. After spending a total of eleven minutes in the building, the shooter took his own life with a handgun. Before traveling to the school, Lanza killed his mother, Nancy Lanza, in their home. In total he had four firearms—the AR-15, two pistols, and a shotgun which was found in his car. All of the guns were legally owned by his mother. The Sandy Hook Final Report, which was filed by the State’s Attorney, determined that Lanza acted alone and thoroughly planned his crimes. Further, he was known to have significant mental health issues and had an obsession with mass murder, particularly the Columbine High School shootings. Despite an extensive investigation of materials and information on the shooter, the report concluded that there was no clear indication of a motive.<sup>129</sup>

Later that day, President Obama delivered a gut-wrenching address from the White House. The President labored emotionally over that speech, crossing out lines from an early draft, saying “I can’t read that. I won’t be able to get through them.”<sup>130</sup> Fighting back tears, the President said, “We’ve endured too many of these tragedies in the past few years.”<sup>131</sup> He urged, “we are going to have to come together to prevent more tragedies like this, regardless of the politics.”<sup>132</sup> “As a country, we have been through this too many times. Whether it’s an elementary school in Newtown, or a shopping mall in Oregon, or a temple in Wisconsin, or a

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<sup>125</sup> Tom Cohen, *Candidates show little appetite for new gun control laws*, CNN (Jul. 26, 2012), <http://www.cnn.com/2012/07/26/politics/gun-control-debate/>

<sup>126</sup> Tom Cohen, *Candidates show little appetite for new gun control laws*, CNN (Jul. 26, 2012), <http://www.cnn.com/2012/07/26/politics/gun-control-debate/>

<sup>127</sup> Tom Cohen, *Candidates show little appetite for new gun control laws*, CNN (Jul. 26, 2012), <http://www.cnn.com/2012/07/26/politics/gun-control-debate/>

<sup>128</sup> Robert Draper, *Inside the Power of the N.R. A.*, New York Times (Dec. 12, 2013), <http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html>

<sup>129</sup> [http://www.ct.gov/csao/lib/csao/Sandy\\_Hook\\_Final\\_Report.pdf](http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf)

<sup>130</sup> Robert Draper, *Inside the Power of the N.R. A.*, New York Times (Dec. 12, 2013), [http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html?\\_r=0&pagewanted=all](http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html?_r=0&pagewanted=all)

<sup>131</sup> Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 1, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>

<sup>132</sup> Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 1, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>

movie theater in Aurora, or a street corner in Chicago—these neighborhoods are our neighborhoods, and these children are our children.”<sup>133</sup>

From these tragedies, he identified a sense of resolve, and issued a call for action: “And we’re going to have to come together and take *meaningful action* to prevent more tragedies like this, regardless of the politics.” But, as the Times noted, “the president stopped short of detailing any new initiatives, like restrictions on high-capacity ammunition magazines or stricter bans on gun buyers with a history of mental illness.”<sup>134</sup> Earlier that day, White House spokesperson Jay Carney declined a reporter’s fervent questioning about passing gun control laws: “I think that day will come, but today’s not that day, especially as we are awaiting more information about the situation.”<sup>135</sup>

Others were not content with calls for mere “meaningful action.” The New York Times noted that “the words were cautious and were immediately criticized for being too timid.”<sup>136</sup> Leading the charge was Mayor Michael Bloomberg, who called for immediate action: “President Obama rightly sent his heartfelt condolences to the families in Newtown. But the country needs him to send a bill to Congress to fix this problem. Calling for ‘meaningful action’ is not enough. We need *immediate action*.”<sup>137</sup> After faulting the White House’s lack of leadership, Bloomberg said, “This is a national tragedy and it demands a national response. My deepest sympathies are with the families of all those affected, and my determination to stop this madness is stronger than ever.”

Newtown would shock the conscience like few others tragedies. According to the Associated Press, a poll of news editors showed that massacre at Sandy Hook was the top story of 2012 (even though it occurred only three weeks before the New Year).<sup>138</sup> A December 19, 2012 Gallup poll showed that half of respondents “say they have been following the news of the Newtown shooting very closely and another 37% are following it somewhat closely.”<sup>139</sup> Gallup observed that “[t]he combined 87% is in the top 10 of more than 200 news stories for which Gallup has measured Americans’ attentiveness since 1991, putting it on par with the 2010 Gulf of Mexico oil spill, the start of the 1991 U.S. ground war in Iraq, and the death of Princess Diana in 1997.” The shooting at Sandy Hook pierced the collective psyche, and affected nearly all Americans.

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<sup>133</sup> *Statement by the President on the School Shooting in Newtown, CT*, The White House (Dec. 14, 2012), <http://www.whitehouse.gov/the-press-office/2012/12/14/statement-president-school-shooting-newtown-ct>

<sup>134</sup> Mark Landler & Erica Goode, *Obama’s Cautious Call for Action Sets Stage to Revive Gun Debate*, New York Times (Dec. 14, 2012), <http://www.nytimes.com/2012/12/15/us/politics/obamas-reaction-to-connecticut-shooting-sets-stage-for-gun-debate.html?pagewanted=all>

<sup>135</sup> Zake Miller, *White House: “Today Is Not The Day” To Debate Gun Control*, BuzzFeed (Dec. 14, 2012), <http://www.buzzfeed.com/zekejmillier/white-house-today-is-not-the-day-to-debate-gun>

<sup>136</sup> Mark Landler & Erica Goode, *Obama’s Cautious Call for Action Sets Stage to Revive Gun Debate*, New York Times (Dec. 14, 2012), <http://www.nytimes.com/2012/12/15/us/politics/obamas-reaction-to-connecticut-shooting-sets-stage-for-gun-debate.html?pagewanted=all>

<sup>137</sup> Ben Shapiro, *Bloomberg: Obama Must Take ‘Immediate Action’ Against Guns*, Breitbart (Dec. 14, 2012), <http://www.breitbart.com/Big-Government/2012/12/14/Bloomberg-politicizes-shooting>

<sup>138</sup> *Poll ranks top 10 news stories of 2012*, USA TODAY (Dec. 20, 2012), <http://www.usatoday.com/story/news/2012/12/20/year-top-news/1783303/>

<sup>139</sup> Lydia Saad, *Parents’ Fear for Children’s Safety at School Rises Slightly*, Gallup (Dec. 28, 2012), <http://www.gallup.com/poll/159584/parents-fear-children-%20safety-school-rises-slightly.aspx>

That time for change would come soon enough. On December 19, “five days since the heartbreaking tragedy in Newtown, Connecticut,” the President issued a call for action.<sup>140</sup> He stressed that “this time, the words need to lead to action. I will use all the powers of this office to help advance efforts aimed at preventing more tragedies like this.”<sup>141</sup> Gun control would now be a “central issue” of his presidency. The President announced that Vice President Joe Biden would lead a task force that would propose specific new laws in January, and would be “proposals that I then intend to push without delay.”<sup>142</sup> “The fact that this problem is complex can no longer be an excuse for doing nothing,” Obama explained. The President would “urge the new Congress to hold votes on these new measures next year, in a timely manner.”<sup>143</sup>

The administration-wide effort was made a priority and the President planned to submit legislative proposals within the next month. In the next few weeks Biden’s group held 22 meetings and reportedly collected proposals from 229 organizations, such as gun control activists like the Brady Campaign, gun rights groups including the NRA, and representatives from the video game industry.

Though, critics in the gun control movement were not pleased because the very act of appointing a task force delayed the process. Here, it is alleged, the President didn’t move *fast enough*. “All of the major proposals of the Biden commission,” Professor Winkler observed, “were well known to anyone who has followed the gun debate: universal background checks, bans on assault weapons, and restrictions on high-capacity magazines. For this hardly innovative set of reforms, Obama didn’t need to wait three weeks. Gun control groups like the Brady Center and Mayors Against Illegal Guns could have offered him draft legislation on these reforms within days.”<sup>144</sup> What does it say about support for a piece of legislation if waiting three weeks—from December to January to introduce legislation—is too long? One point to stress is that supporters did not favor speed because it would result in better legislation, or reflect a wider consensus. No. Speed was necessary to strike while the iron was hot, before sentiments turned.

## C. Introspection and Action

### 1. The Proposal

Upon gathering the information from the Biden task force, on January 16th, 2013, President Obama unveiled his gun control proposals. These recommendations included: criminal background check requirements for all gun sales, an assault weapons ban, a 10-round limit on ammunition magazines, a ban on armor-piercing bullets, a measure that provides mental health

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<sup>140</sup> *Remarks by the President in a Press Conference*, The White House: Office of the Press Secretary (Dec. 19, 2012), <http://www.whitehouse.gov/the-press-office/2012/12/19/remarks-president-press-conference>

<sup>141</sup> Michael Shear, *Obama Vows Fast Action in New Push for Gun Control*, New York Times (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/politics/obama-to-give-congress-plan-on-gun-control-within-weeks.html?pagewanted=all>

<sup>142</sup><sup>142</sup> Michael Shear, *Obama Vows Fast Action in New Push for Gun Control*, New York Times (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/politics/obama-to-give-congress-plan-on-gun-control-within-weeks.html?pagewanted=all>

<sup>143</sup><sup>143</sup> Michael Shear, *Obama Vows Fast Action in New Push for Gun Control*, New York Times (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/politics/obama-to-give-congress-plan-on-gun-control-within-weeks.html?pagewanted=all>

<sup>144</sup> Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 12, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>

services in schools, an increase in funding to hire more police officers, and the passage of a federal gun trafficking statute.<sup>145</sup> The President sent these measures to Congress. The administration also supplemented these legislative proposals with 23 executive orders that would take immediate effect, that would accomplish: increasing incentives for states to share information with the background check system, reviewing gun locks and safes standards, nominating an ATF director, maximizing efforts to prosecute gun crimes, issuing a memorandum directing the CDC to research the causes and prevention of gun crimes, increasing incentives for schools to procure resource officers, and launching a national discussion led by Secretaries Sebelius and Duncan on mental health.<sup>146</sup>

In the spring of 2013 Senator Joe Manchin, a Republican from West Virginia, searched for a pro-gun rights Republican as a partner for legislation that expanded background checks. He convinced Pennsylvania Republican Pat Toomey to join his efforts. Both senators were favorites of the NRA and had earned “A” ratings from the organization in the past. In April the pair announced that they had reached a bipartisan deal that would expand gun background checks to purchases at gun shows and online. Unlike the Democratic plan, these checks would not cover sales between family members and neighbors, and most importantly, prohibited the creation of any firearm registry.<sup>147</sup> The measure was offered as an amendment to the Senate’s gun bill and was seen as crucial for any larger bipartisan agreement.<sup>148</sup>

## 2. Time is of the Essence

In the wake of Sandy Hook, the popular support seemed to be behind the President. Following Newtown, a “newfound momentum” known as the “Connecticut effect” spurred support for gun-control advocacy groups.<sup>149</sup> Others called Newtown a “game changer.”<sup>150</sup> This shift can be demonstrated by public opinion polling. Pew Research showed a jump in support of stricter gun control laws from 47% in June 2012, to 49% in December 2012, to 51% in January 2013. For the first time during the Obama presidency, more people prioritized gun control (49%) than gun rights (42%).<sup>151</sup> Professor Winkler observed that at the time, “it looked as if new federal gun laws were inevitable.”<sup>152</sup>

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<sup>145</sup>Sam Stein & John Rudolf, *Obama Gun Control Proposals Unveiled, Marking Biggest Legislative Effort In A Generation*, Huffington Post (Jan. 16, 2013), [http://www.huffingtonpost.com/2013/01/16/obama-gun-control-proposals\\_n\\_2486919.html](http://www.huffingtonpost.com/2013/01/16/obama-gun-control-proposals_n_2486919.html)

<sup>146</sup>Rick Ungar, *Here Are The 23 Executive Orders On Gun Safety Signed Today By The President*, Forbes (Jan. 16, 2013), <http://www.forbes.com/sites/rickungar/2013/01/16/here-are-the-23-executive-orders-on-gun-safety-signed-today-by-the-president/>

<sup>147</sup>Jennifer Steinhauer, *A Senator’s Search for an Ally Keeps a Gun Bill Alive*, New York Times (Apr. 10, 2013), <http://www.nytimes.com/2013/04/11/us/politics/compromise-on-background-checks.html?pagewanted=1&r=0>

<sup>148</sup>Lucy Madison, *As Manchin-Toomey amendment falters, GOP offers alternate gun proposal*, CBS News (Apr. 17, 2013), <http://www.cbsnews.com/news/as-manchin-toomey-amendment-falters-gop-offers-alternate-gun-proposal/>

<sup>149</sup>Sarah Childress, *How the Fun-Rights Lobby Won After Newtown*, PBS (Dec. 10, 2013), <http://www.pbs.org/wgbh/pages/frontline/social-issues/newtown-divided/how-the-gun-rights-lobby-won-after-newtown/>

<sup>150</sup>Erica Goode, *In Gun Debate, Divide Grows as Both Sides Dig In for Battle*, New York Times (Sep. 15, 2003), <http://www.nytimes.com/2013/09/16/us/in-gun-debate-divide-grows-as-both-sides-dig-in-for-battle.html>

<sup>151</sup>*After Newtown, Modest Change in Opinion about Gun Control*, Pew Research (Dec. 20, 2012), <http://www.people-press.org/2012/12/20/after-newtown-modest-change-in-opinion-about-gun-control/>

<sup>152</sup>Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 12, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>

However, this support is not permanent. A corollary of emotional capture is that time is of the essence for passing laws during this period of heightened support. “After Newtown,” Professor Winkler observed, “it was clear to everyone on the gun control side that speed was of the essence. The longer it took to move a bill to the floor for a vote, the harder it would be to win.”<sup>153</sup> In January of 2013, the supporters of gun control legislation understood the importance of speed. If they waited too long, the window would close. “Gun control advocates,” the New York Times reported, “have urged the White House and lawmakers to move rapidly to enact new gun control measures before the killings in Connecticut fade from the public’s consciousness.”<sup>154</sup>

Why? Because the “president has just a small window in which to persuade Congress to back a series of gun control measures that will come up for a vote in the Senate early next month.” Why was the window small? Emotional capture helps to explain these shifting positions. Senator Manchin, who championed the gun control legislation in the Senate, was optimistic about passage due to a “confluence of factors at the time [that] favored his efforts: a newly re-elected Democratic president personally stung by the gun tragedies that took place on his watch . . . and the forceful but sympathetic lobbying presence of Gabrielle Giffords, the former congresswoman who had been shot in the head in Tucson, along with the voices of the Newtown parents whose children were killed.”<sup>155</sup> In other words, what made this situation different from previous opportunities to enact gun control reform was the depth of the emotional capture. In Manchin’s mind, it was not newly discovered facts or statistics about gun control that would make this situation different, but the emotions that would charge the reform. It was necessary to pass the laws before the passions returned to the status quo.

The President’s rhetoric reflects this imperative. During his speeches, the President kept the emotions strong, and reminded us how we felt in December. His entreaties for support were raw appeals to emotions. For example, on January 16, 2013, the President reminded us that “every day we wait, that number [killed by guns] will keep growing.”<sup>156</sup> The President stressed that we need to honor the memories of the victims by reforming the law. “Now, over the month since the tragedy in Newtown, we’ve heard from so many. And obviously, none have affected us more than the families of those gorgeous children and their teachers and guardians who were lost. And so we’re grateful to all of you for taking the time to be here and recognizing that we honor their memories in part by doing everything we can to prevent this from happening again.”<sup>157</sup> It would be against this emotional backdrop that any legislative change would be made.

President Obama even addressed indirectly what we label emotional capture in his April 17 statement following the defeat of the Manchin-Toomey bill, though using the label

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<sup>153</sup> Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 12, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>

<sup>154</sup> Michael D. Shear, *Obama Vows Fast Action in New Push for Gun Control*, New York Times (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/politics/obama-to-give-congress-plan-on-gun-control-within-weeks.html?pagewanted=all>

<sup>155</sup> Robert Draper, *Inside the Power of the N.R.A.*, New York Times (Dec. 12, 2013), <http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html>

<sup>156</sup> *Remarks by the President and the Vice President on Gun Violence*, The White House: Office of the Press Secretary (Jan. 16, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence>

<sup>157</sup> *President Obama’s remarks on new gun control actions (Transcript)*, Washington Post (Jan. 16, 2013), [http://www.washingtonpost.com/politics/president-obamas-remarks-on-new-gun-control-proposals-jan-16-2013-transcript/2013/01/16/528e7758-5ffc-11e2-b05a-605528f6b712\\_print.html](http://www.washingtonpost.com/politics/president-obamas-remarks-on-new-gun-control-proposals-jan-16-2013-transcript/2013/01/16/528e7758-5ffc-11e2-b05a-605528f6b712_print.html)

“emotional blackmail.”<sup>158</sup> “I’ve heard folks say that having the families of victims lobby for this legislation was somehow misplaced. ‘A prop,’ somebody called them. ‘Emotional blackmail,’ some outlet said. Are they serious? Do we really think that thousands of families whose lives have been shattered by gun violence don’t have a right to weigh in on this issue? Do we think their emotions, their loss is not relevant to this debate?”<sup>159</sup> Certainly their emotions are relevant to the debate, but the President’s goal was to make the emotions dispositive to passing the bill in this culture war.

### 3. From Mass Shootings To Gun Violence

Once emotional capture sets in, the goals of legislative change quickly expand into other realms related to the tragedy. This *creep* is reflected in the rhetoric of the President. To address his developing legislative agenda, the President appointed Vice President Biden to head a task force to “to help prevent mass shootings, [and] to *reduce the broader epidemic of gun violence* in this country.”<sup>160</sup> Notice the pivot between the two clauses. The goal is not merely to prevent “mass shootings,” but to “reduce the broader epidemic of gun violence in this country.” Or, as Mark Glaze, director of Mayors Against Illegal Guns noted, “Mass shootings ... are the tragedies that capture the public’s attention. But every day, 33 Americans are being killed, mostly with handguns and distressingly often, by a family member or intimate partner.”<sup>161</sup> The shock and awe of the mass shooting, and support to stop those tragedies, soon gives way to address the broader issue of gun deaths.

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

Similarly, during his State of Union address on February 13, 2013 the President made the point of integrating together the mass shooting in Newtown and reducing gun violence: “It has been two months since Newtown. I know this is not the first time this country has debated how to reduce gun violence.” Again, relying on the availability heuristic, the President merges the

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<sup>158</sup> NRO Staff, *Krauthammer’s Take: Gun-Control Push Consisted of ‘Emotional Blackmail’*, National Review Online (Apr. 17, 2013), <http://www.nationalreview.com/corner/345880/krauthammers-take-gun-control-push-consisted-emotional-blackmail> Charles Krauthammer, who supports gun control, said, ““If you’re going to make all of these emotional appeals,” he said, “you’ve gotta show that if this had been law, it would have stopped Newtown. It would not have. It’s irrelevant. I wouldn’t have objected, I might’ve gone the way of McCain or Toomey on this, but it’s emotional blackmail to say ‘You have to do it for the children.’ Not if there’s no logic in this, and that I think is what’s wrong with the demagoguery that we’ve heard out of the president on this issue.”)

<sup>159</sup> *Statement by the President*, The White House: Office of the Press Secretary (Apr. 17, 2013), <http://www.whitehouse.gov/the-press-office/2013/04/17/statement-president>

<sup>160</sup> *Remarks by the President and the Vice President on Gun Violence*, The White House: Office of the Press Secretary (Jan. 16, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/16/remarks-president-and-vice-president-gun-violence>

<sup>161</sup> <http://www.usatoday.com/story/news/nation/2013/02/21/mass-shootings-domestic-violence-nra/1937041/>

rare mass shooting into the broader umbrella of gun violence. This decision obviates the need to establish that specific gun control reforms would have stopped Newtown, or will stop future mass shootings. Rather, anything aimed at the larger category of gun violence will now suffice.

This is not to suggest in the least that it is inappropriate to attempt to address broader issues of gun violence through legislation after mass shootings. Instead, our point is that there was no momentum for this legislation before December. The 900 people who were killed from December to January is roughly equal to the 900 killed from November to December. But, there was no national movement to legislate following those deaths. There was no electoral mandate to support new gun control laws. This momentum was only discovered after December 12, 2012. All that changed was Sandy Hook. It was only because of Newtown that the opportunity arose to pass gun laws aimed at the broader issue of gun violence. This is the essence of mission creep during emotional capture.

#### D. Divergence

By March 28, 2013, following the three-month anniversary of Newtown, in impromptu remarks, the President worried that post-Newtown momentum has faded. The New York Times reported that his comments were “delivered in an impassioned and off-script manner, [and] were aimed at reviving the impetus that gun-control advocates fear they are losing as more time passes since the shootings.”<sup>162</sup> “The notion that two months or three months after something as horrific as what happened in Newtown happens,” the President questioned, “and we’ve moved on to other things?”<sup>163</sup> Uncharacteristically, the Times noted, “he seemed to speak extemporaneously much of the time and expressed irritation in a way that he generally does not. At some moments, he paused and took a breath as if collecting himself and circled back to some of his points for emphasis.”<sup>164</sup>

Answering his own question, Obama challenged who we are as a people, “That’s not who we are. That’s not who we are.” The President continued, “Now, I want to make sure every American is listening today. Less than a hundred days ago that happened [Newtown]. And the entire country was shocked, and the entire country pledged we would do something about it and that this time would be different.” “We need everybody to remember how we *felt* 100 days ago,” he stressed, “and make sure that what we said at that time wasn’t just a bunch of platitudes, that we meant it.” The President concluded, “Shame on us if we’ve forgotten. I haven’t forgotten those kids. Shame on us if we’ve forgotten.” The Times speaks clearly to the President’s motivations. “Mindful of the fact that passions are rising among gun rights activists as they seem

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<sup>162</sup> Jeremy Peters & Peter Baker, *Months After Massacre, Obama Seeks to Regain Momentum on Gun Laws*, New York Times (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/us/politics/obama-makes-impassioned-plea-for-gun-control.html>

<sup>163</sup> Jeremy Peters & Peter Baker, *Months After Massacre, Obama Seeks to Regain Momentum on Gun Laws*, New York Times (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/us/politics/obama-makes-impassioned-plea-for-gun-control.html?partner=rss&emc=rss&pagewanted=all>

<sup>164</sup> Jeremy Peters & Peter Baker, *Months After Massacre, Obama Seeks to Regain Momentum on Gun Laws*, New York Times (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/us/politics/obama-makes-impassioned-plea-for-gun-control.html>

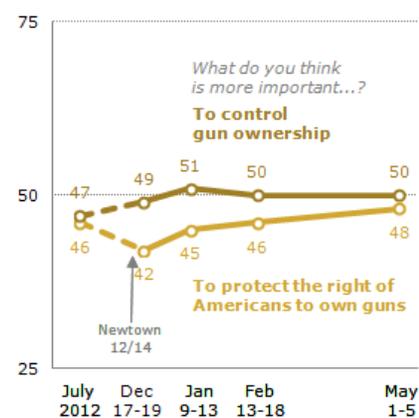
to be ebbing in the other direction, Mr. Obama sought to draw on the emotion and revulsion around the Newtown shooting.”<sup>165</sup> In other words, he sought to recapture the fading emotions.

The President’s impassioned plea rests on two flawed assumptions: (1) that emotional capture to support his reform would not regress to the mean, and (2) that failing to support his gun control proposals means people have forgotten the death of the children at Newtown.

### 1. Support Regresses to the Mean

First, the President assumes that American’s emotional fervor to pass gun control laws remained constant following Newtown. That’s not correct. Polling data shows that in the three months following Newtown, support for stricter gun laws dropped almost as quickly as they spiked. This is evidence of regression to the mean. A Pew Research report, which found a “return to pre-Newtown levels” for stricter gun control laws, shows the regression very clearly.<sup>166</sup> By May of 2013, Pew concluded, “the overall trend on whether it is more important to control gun ownership or protect gun rights has edged back in the direction of gun rights.”<sup>167</sup> Before Newtown in July 2012 the breakdown of support of control and rights was 47% and 46% respectively. After Newtown, it departed widely with 49% for support and 42% for rights in December. This was the spike. By January, when the President introduced proposed reforms, it increased somewhat, with 51% for support and 45% for rights. (Our earlier discussion of the shifts in those who strongly and moderately favor stricter gun controls explains breaks down this shift). By February, the gap started to narrow, with 50% for control and 46% for rights. By May, the gap closed to 50% for support, and 48% for rights. With each day that passes, support weakened.

**Views of Gun Control vs. Rights Return to Pre-Newtown Levels**



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Other polls found similar regressions. In late April 2013, USA Today reported that “Americans are more narrowly divided on the issue than in recent months, and backing for a bill has slipped below 50%.” Specifically, in NBC News/Wall Street Journal polls, support dropped from 61% in February to 55% in early April to only 49% in late April.<sup>168</sup> A December 2013 CNN/ORC International survey found that “49% of Americans say they support stricter gun control laws, with 50% opposed. The 49% support is down six percentage points from the 55%”

<sup>165</sup>Jeremy Peters & Peter Baker, *Months After Massacre, Obama Seeks to Regain Momentum on Gun Laws*, New York Times (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/us/politics/obama-makes-impassioned-plea-for-gun-control.html>

<sup>166</sup>*Broad Support for Renewed Background Checks Bill, Skepticism about Its Chances*, Pew Research (May 23, 2013), <http://www.people-press.org/2013/05/23/broad-support-for-renewed-background-checks-bill-skepticism-about-its-chances/#overall-trend>

<sup>167</sup>*Broad Support for Renewed Background Checks Bill, Skepticism about Its Chances*, Pew Research (May 23, 2013) <http://www.people-press.org/2013/05/23/broad-support-for-renewed-background-checks-bill-skepticism-about-its-chances/#overall-trend>

<sup>168</sup> Susan Page, *USA TODAY Poll: Public support for gun control ebbs*, USA Today (Apr. 23, 2013), <http://www.usatoday.com/story/news/politics/2013/04/22/usa-today-poll-finds-support-for-gun-control-ebbs-backing-for-immigration-bill-strong/2103419/>

following Newtown.<sup>169</sup> All public opinion polls reflect the regression to the mean in the months after Newtown. The President astutely noted that the momentum had faded, and felt helpless about stemming the tide.

The concept of regression to the mean answers a primary question asked by the President: how is it possible that “two months or three months after something as horrific as what happened in Newtown happens,” Americans have “moved on to other things?”<sup>170</sup> The answer is that the spike in support for gun control was the anomalous data point, the outlier. As time elapses, society naturally regresses to the mean. Professor Kahneman explains that when our “attention is called to an [out of the ordinary] event, associative memory will look for its cause.”<sup>171</sup> For example, when popular support for gun control spikes after a shooting, our minds try to rationalize this change. The President, and no doubt others, assumed this spike was the result of a shift in how Americans view the gun control issues. But, “our mind is strongly biased toward causal explanations,” Professor Kahneman observes, and does not deal well with ‘mere statistics.’”<sup>172</sup> But often, statistical anomalies explain the changes, not a quantum shift in views towards guns.

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

## 2. Remembering the Loss but Opposing the Change

The second point is perhaps the most emotional. The President assumes that if the American people do not support his agenda, they have forgotten those murdered in Newtown. “Shame on us if we’ve forgotten. I haven’t forgotten those kids. Shame on us if we’ve forgotten.” The President even suggested that those who oppose his legislation don’t care about protecting children from gun violence: “The point is those who care deeply about preventing more and more gun violence will have to be as passionate, and as organized, and as vocal as those who blocked these common-sense steps to help keep our kids safe.”<sup>173</sup> His comments demonize those who oppose gun control legislation as people intent on allowing children to be killed.

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<sup>169</sup> CNN Political Unit, *CNN Poll: Support for stricter gun control fades*, CNN Politics (Dec. 4, 2013), <http://politicalticker.blogs.cnn.com/2013/12/04/cnn-poll-support-for-stricter-gun-control-fades/>

<sup>170</sup> Jeremy Peters & Peter Baker, *Months After Massacre, Obama Seeks to Regain Momentum on Gun Laws*, New York Times (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/us/politics/obama-makes-impassioned-plea-for-gun-control.html>

<sup>171</sup> DANIEL KAHNEMAN, THINKING, FAST, AND SLOW 182 (2011).

<sup>172</sup> DANIEL KAHNEMAN, THINKING, FAST, AND SLOW 183 (2011).

<sup>173</sup> See also LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM 2 (2008). Following the introduction of the Patriot Act in the United States Senate, Attorney General John Ashcroft testified, “[T]o those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for

Reasonable minds can differ about the efficacy of different gun control laws. Even Senator Manchin, who championed the background check bill conceded that it “would not have prevented the Newtown killings, because the shooter, Adam Lanza, used firearms that were legally purchased by his mother.”<sup>174</sup> Certainly, reasonable minds can differ about the impact a ban on assault weapons would have on gun violence, in light of the fact that the overwhelming majority of gun deaths are from handguns, not rifles. Professor Winkler states it plainly: “Even if the law could be passed, it wouldn’t have made any dent in gun violence statistics because these guns are rarely used in crime.” This proposal had “only one certain outcome from proposing to ban assault weapons: It was guaranteed to stimulate the fiercest opposition.” In fact, California Governor Jerry Brown vetoed a bill that would have banned all semiautomatic rifles with detachable magazines.<sup>175</sup> In his veto message, he said “I don’t believe that this bill’s blanket ban on semiautomatic rifles would reduce criminal activity or enhance public safety enough to warrant this infringement on gun owners’ rights.”<sup>176</sup>

Reasonable minds can differ about whether banning magazines that hold more than ten bullets—the overwhelming majority of semiautomatic handguns have magazines of that size—would be worth the cost. Support for this proposal dropped from 62% in December 2012<sup>177</sup> to 54% in January 2013 to 51% in April 2013. A similar bill introduced in California never made it past the Senate.<sup>178</sup> Such a bill was enacted in New York,<sup>179</sup> though it was quickly modified to allow people to possess large magazines, but they couldn’t be filled up past the limit of seven.<sup>180</sup>

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

## E. Status Quo

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they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil."

<sup>174</sup> Robert Draper, *Inside the Power of the N.R. A.*, New York Times (Dec. 12, 2013), [http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html?\\_r=0&pagewanted=all](http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html?_r=0&pagewanted=all)

<sup>175</sup> California Senate Bill 374, (2013).

<sup>176</sup> *Senate Bill 374 Veto Message*, Office of the Governor (Oct. 11, 2013), [http://gov.ca.gov/docs/SB\\_374\\_2013\\_Veto\\_Message.pdf#page=1&zoom=auto,0,563](http://gov.ca.gov/docs/SB_374_2013_Veto_Message.pdf#page=1&zoom=auto,0,563)

<sup>177</sup> Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, Gallup Politics (Dec. 27, 2012), <http://www.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx>

<sup>178</sup> California Senate Bill 396, (2013).

<sup>179</sup> Josh Blackman, *New York's New Ban on "Large Capacity Ammunition Feeding Devices" (More than 7 Rounds)*, Josh Blackman's Blog (Jan. 15, 2013), <http://joshblackman.com/blog/2013/01/15/new-yorks-new-ban-on-large-capacity-ammunition-feeding-devices-more-than-7-rounds/>

<sup>180</sup> Josh Blackman, *Revised NY Gun Law: You Can Have 10-Round Magazine, But Can Only Load 7 Rounds*, Josh Blackman's Blog (Mar. 20, 2013), <http://joshblackman.com/blog/2013/03/20/revised-ny-gun-law-you-can-have-10-round-magazine-but-can-only-load-7-rounds/>

By April of 2013, society statistically returned to the pre-Newtown status quo. The Manchin-Toomey bill, under an agreement reached by both parties, needed 60 votes to proceed. On April 17, 2013, Manchin-Toomey experienced the same fate as the other gun control measures that came to a vote that day—the legislation failed to get the 60 votes that it needed to overcome a filibuster and move forward. The vote garnered 54 votes for and 46 votes against. 48 Democrats supported the bill, joined by four republicans and two independents. 41 Republicans opposed the bill, joined by 5 democrats.<sup>181</sup> The bill needed sixty votes to invoke cloture. The assault weapons bill was defeated by a vote of 60-40. The proposed ban on large-capacity magazines failed 46-54, with ten Democrats breaking with the President.

## 1. Defeat

The President gave an emotional speech on April 17 alongside families of the victims of Newtown, Gabby Giffords, and others. “A few months ago, in response to too many tragedies – including the shootings of a United States Congresswoman, Gabby Giffords, who’s here today, and the murder of 20 innocent schoolchildren and their teachers—this country took up the cause of protecting more of our people from gun violence.” He continued, “When Newtown happened, I met with these families and I spoke to the community, and I said, something must be different right now. We’re going to have to change. That’s what the whole country said.”

“Everybody talked about how we were going to change something to make sure this didn’t happen again, just like everybody talked about how we needed to do something after Aurora. Everybody talked about we needed change something after Tucson.” The President channeled the “emotions that we’ve all felt since Newtown, the emotions that we’ve all felt since Tucson and Aurora and Chicago—the pain we share with these families and families all across the country who’ve lost a loved one to gun violence—I’m assuming that’s not a temporary thing. I’m assuming our expressions of grief and our commitment to do something different to prevent these things from happening are not empty words.”

The President concluded, “I believe we’re going to be able to get this done. Sooner or later, we are going to get this right. The memories of these children demand it. And so do the American people.” The regression to the mean does not eliminate the emotions we felt, but merely mitigates the desire for change. Desires to change after tragedies are not, in the President’s word, a “temporary thing.” Any plans for action that came from that tragedy were borne from resolve. And with time, that resolve subsides, and people’s previous policy preferences largely return.

In the end, many were left wondering if the background check bill had been voted on earlier—before the window closed—would it have been successful? Shortly after the Biden task force released its recommendations, the Times reported that though the NRA opposed universal background check bill, the NRA lobbyists thought that a there “would be no political will to oppose” it.<sup>182</sup> Professor Winkler laments this delay, and suggests that it backfired: “Gun control advocates who’ve sought universal background checks for decades, only to be disappointed time after time, have only to wonder what might have been.”<sup>183</sup> Whether this bill would have passed if

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<sup>181</sup> *Senate Vote 97- Defeats Manchin-Toomey Background Checks Proposal*, New York Times (Apr. 17, 2013), <http://politics.nytimes.com/congress/votes/113/senate/1/97>

<sup>182</sup> Robert Draper, *Inside the Power of the N.R. A.*, New York Times (Dec. 12, 2013), [http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html?\\_r=0&pagewanted=all](http://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html?_r=0&pagewanted=all). “

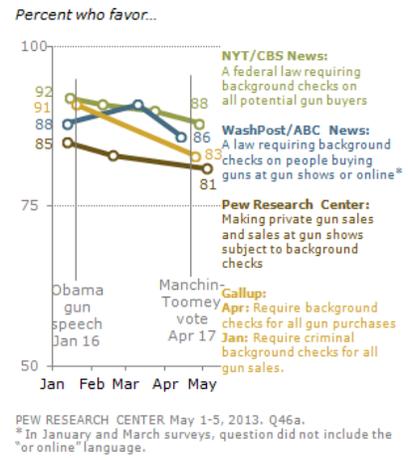
<sup>183</sup> Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 12, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible> “Many gun owners

the President only pursued background checks, and not more controversial provisions like the assault weapons ban,<sup>184</sup> or ban on high-capacity magazines is impossible to know in hindsight.

But as we noted at the outset, our theory tells an incomplete version of the events. Our analysis does not address the defeat of the Manchin-Toomey background check bill, which garnered overwhelming popular support. This level of support would remain fairly constant, though it did drop somewhat from January to April. Pew Research tracked the changes in views on background checks from President Obama’s speech on January 16, 2013, and the Manchin-Toomey vote on April 17, 2013.<sup>185</sup> The New York Times/CBS News poll showed a drop in support of background check bill from 92% in January, to 91% in February, to 90% in April, to 88% in May. Gallup showed a drop from 91% in January to 83% in May. Pew showed a drop from 85% in January to 83% in March, to 81% in May. The outlier was Washington Post/ABC News, which showed 88% in January, a bump to 91% in January, and a drop to 86% in May.

It is here, that the influence of the NRA cannot be understated. The President, in his speech, laid the blame for defeat on the NRA. “There were no coherent arguments as to why we wouldn’t do this. It came down to politics—the worry that that vocal minority of gun owners would come after them in future elections. They worried that the gun lobby would spend a lot of money and paint them as anti-Second Amendment.”<sup>186</sup> We do not discount the role the NRA played in the defeat of the Manchin-Toomey bill. President Obama would likely agree with Professor Robert Spitzer, who wrote, “The nature of interest-group politics is such that the energized and intense backers of the NRA have repeatedly proven the axioms that a highly motivated, intense minority operating effectively in the interest-group milieu will usually prevail in a political contest over a larger, relatively apathetic majority.”<sup>187</sup> The NRA came out in full force against the Manchin-Toomey compromise.

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



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

<sup>184</sup> A colloquy from a meeting attended by Vice President Biden, and several leading Second Amendment supporters, is instructive of the scope of overreach. “On Jan. 10, 2013, Biden hosted a meeting in his Executive Office Building suite with several Second Amendment supporters, including the veteran N.R.A. lobbyist Jim Baker. When Biden asked if the N.R.A. would consider supporting a ban on assault weapons or high-capacity magazine clips, Baker’s answer was a crisp “no.” But when asked the same thing about universal background checks, Baker equivocated, saying, “I’d have to see what you’re talking about.”

<sup>185</sup> *Broad Support for Renewed Background Checks Bill, Skepticism about Its Chances*, Pew Research (May 23, 2013), <http://www.people-press.org/2013/05/23/broad-support-for-renewed-background-checks-bill-skepticism-about-its-chances/#overall-trend>

<sup>186</sup> *Statement by the President*, The White House: Office of the Press Secretary (Apr. 17, 2013), <http://www.whitehouse.gov/the-press-office/2013/04/17/statement-president>

<sup>187</sup> ROBERT SPITZER, *THE POLITICS OF GUN CONTROL* (2011).

We suspect the theory of political ignorance, combined with the substitution heuristic, are also at play. Kahneman explains that people rely on the substitution heuristic when they are asked to make a tough judgment: “they substitute an evaluation of the evidence, without noticing that the question they answer is not the one they were asked. This process is guaranteed to generate predictions that are systematically biased; they completely ignore regression to the mean.”<sup>188</sup> To put this into context, when people consider Manchin-Toomey, a universal background check bill that specifically does not provide for registration, they substitute that more difficult-to-assess provision with a simpler one: background checks that lead to registration. Even though they may support background checks in the abstract (as the data supports), they oppose a non-existent bill that does more. Here opponents of the law are being ignorant, and substituting a difficult judgment for an easier judgment. As Professor Ilya Somin explains in his book, *Democracy and Political Ignorance: Why Smaller Government Is Smarter*, “the main informational barriers to majoritarian control of legislation on specific issues are the facts that (1) much legislation is completely unknown to most citizens and (2) even when this is not the case, the effects of much legislation are often sufficiently complex that voters cannot readily tell whether the legislation in question will advance their values and interests or not.”<sup>189</sup> But this theory also only explains part of the defeat of Manchin-Toomey.

We concede that the shooting cycle tells an incomplete portion of the changes in the year after Newtown. Yet the role that public opinion plays in this process has been under-discussed in the academic literature, and in contemporary accounts. The conventional narrative is that after a shooting, the NRA uses its legislative clout and influence on Congress to stop reform. But this only tells part of the story.

## 2. One Year Later

A CNN lead from December 2013 effectively summarizes the regression to the mean and return to the status quo in the year after Newtown. “As memories fade from last December's horrific school shooting in Newtown, Connecticut, a new national poll indicates that support for stricter gun control laws appears to be fading, too.”<sup>190</sup> The CNN poll found that support for stricter gun control laws was at 49%, down from 55% who supported the laws in January, 2013. Further, in January, the poll found that 37% of Americans *strongly* favored stricter laws, and 27% *strongly* opposed them. CNN observes that the “intensity of opinion on the issue of gun control, once an advantage for gun-control advocates, no longer benefits either side,” as the “10-point difference has completely disappeared, with the number who strongly oppose and strongly favor stricter gun control at essentially the same level.” In other words, those who were driven to strongly favor these laws drifted back towards the mean—the B students became C students. A Wall Street Journal/NBC News Poll, conducted on the anniversary of Newtown found tracked the return to the status quo.<sup>191</sup> Support from stricter gun laws went from 56% in January to 61%

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<sup>188</sup> Kahneman, *Thinking Fast and Slow* 188 (2012).

<sup>189</sup> Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* 159-160 (2013).

<sup>190</sup> CNN Political Unit, *CNN Poll: Support for stricter gun control fades*, CNN Politics (Dec. 4, 2013), <http://politicalticker.blogs.cnn.com/2013/12/04/cnn-poll-support-for-stricter-gun-control-fades/>

<sup>191</sup> [http://msnbcmedia.msn.com/i/MSNBC/Sections/A\\_Politics/\\_Today\\_Stories\\_Teases/13528%20December%20NBC-Wsj%20Final%20Filled-InCORRECTED.pdf](http://msnbcmedia.msn.com/i/MSNBC/Sections/A_Politics/_Today_Stories_Teases/13528%20December%20NBC-Wsj%20Final%20Filled-InCORRECTED.pdf)

in February to 55% in April to 52% in December. They concluded, in the previous year, “support has softened” for stricter gun laws.<sup>192</sup>

We are back at the status quo. And if the decreasing trend line is any trend is any indication, it will be even tougher to enact gun control laws going forward.

### 3. Breaking the Cycle

We conclude by asking whether the shooting cycle is permanent. Absolutely not. This answer of how to change it, ultimately, will have to involve changing the downward slope of the trend line of Americans that support stricter gun controls. This is part of what Richard Hofstadter famously referred to as America’s “gun culture.” This means that in order for the line to slope upwards, our culture would have to change. Professor Adam Winkler similarly opined that modifying gun laws, such as banning concealed firearms on college campuses will have little impact on safety. “What is really at stake is America’s gun culture.”<sup>193</sup> As one pundit noted after the shooting in Aurora, “the latest tragedy in Colorado may well produce another brief polling bump, but it is unlikely to shift in attitudes over the long term absent a more fundamental change in the gun policy debate.”<sup>194</sup>

The goal of changing this culture is reflected in the work of Professor Goss: “Thus, I argue that the true paradox is the discrepancy between what people tell pollsters (“We want strict gun control”) and what people’s actual behavior suggests (“We are indifferent”). The gun control paradox properly understood is: Why do Americans who want strict gun control not mobilize, in large numbers in a sustained way, to get it?”<sup>195</sup> Recent developments in the gun-control movement suggest that such a mobilization is happening. Recent organizations of gun control groups intent to accomplish the goal of cultural change are beginning to provide a counterweight to the NRA. Brian Malte, the mobilization director for the Brady Campaign to Prevent Gun Violence, commented on the importance of Sandy Hook for the gun rights movement. “Newtown, from my perspective of being in this movement for 18 years, and gone through a lot of high-profile tragedies like Virginia Tech and Columbine, this was different in that many, many more people got involved. And the difference now is that the people who got involved because of Sandy Hook, they’re staying in the movement. Just because the legislation didn’t succeed in the U.S. Senate in April, people didn’t pack up their boxes and go home, they got really upset, reenergized, and are making a difference in their local community. The Brady Campaign chapters grew by 25 percent since Sandy Hook. And a lot of these advocates are in key congressional districts and states. I can’t really identify one person who’s come in since Sandy Hook who’s left the movement, it was that big of a deal.” Though, as a counterweight, in the month after Newtown the NRA claimed they added 250,000 new members.

The President spoke of the need to organize, and challenge the NRA. “Ultimately, you outnumber those who argued the other way. But they’re better organized. They’re better financed. They’ve been at it longer. And they make sure to stay focused on this one issue

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<sup>192</sup>Mark Murray, *Poll: Support for strict gun control drops to pre-Newtown levels*, NBC News (Dec. 13, 2013), [http://firstread.nbcnews.com/\\_news/2013/12/13/21878758-poll-support-for-strict-gun-control-drops-to-pre-newtown-levels?lite](http://firstread.nbcnews.com/_news/2013/12/13/21878758-poll-support-for-strict-gun-control-drops-to-pre-newtown-levels?lite)

<sup>193</sup> Adam Winkler, *The Guns of Academe*, New York Times (Apr. 14, 2011), [http://www.nytimes.com/2011/04/15/opinion/15winkler.html?\\_r=1&ref=opinion](http://www.nytimes.com/2011/04/15/opinion/15winkler.html?_r=1&ref=opinion)

<sup>194</sup> Mark Blumenthal, *Gun Control Polls Show Longterm Decline in Support, Despite Columbine Bump*, Huffington Post (Jul. 24, 2012), [http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting\\_n\\_1690169.html](http://www.huffingtonpost.com/2012/07/20/gun-control-polls-aurora-shooting_n_1690169.html)

<sup>195</sup> KRISTEN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL* (2008).

during election time.”<sup>196</sup> Malte added that the process is long, recognizing that things aren’t “quick and simple.” “And I think that fights against the perception against a lot of those in the media, and on Capitol Hill, which is: “Well, it’s been a year since Sandy Hook, I guess your windows closed. I guess you weren’t successful. Now what?” Now what? What do you mean? We’ve just begun. This is just the beginning. Change, especially on Capitol Hill, does not come easy. It’s not quick and simple. It’s something we all realize, and just like the Brady law, we’re going to see it through.”

To change the shooting cycle, gun control advocates must change the gun culture. But to change the gun culture, gun control advocates must explain, or at least distance themselves from the position that causes the fiercest opposition—that the Brady Campaign sees as its ultimate goal the criminalization of possessing guns. Nelson “Pete” Shields III, a founder of Handgun Control, Inc.—the aptly named progenitor of the Brady Center to Prevent Gun Violence—openly advocated for the elimination of all handguns: ““We’re going to have to take this one step at a time. . . . Our ultimate goal—total control of all guns—is going to take time.’ The ‘final problem,’ he insisted, ‘is to make the possession of all handguns and all handgun ammunition’ for ordinary civilians ‘totally illegal.’”<sup>197</sup> John Hechinger, a sponsor of the D.C. handgun ban and a board member of Handgun Control, Inc., put it simply: “We have to do away with the guns.”<sup>198</sup> The reasoning for these moves is accurately summed up in a quotation from 1996 by conservative columnist Charles Krauthammer, who conceded that the assault weapons ban would not result in a decrease in violence, but it served as an important symbolic step in desensitizing Americans towards the path of banning all guns.<sup>199</sup>

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

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

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

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<sup>196</sup> *Statement by the President*, The White House: Office of the Press Secretary (Apr. 17, 2013), <http://www.whitehouse.gov/the-press-office/2013/04/17/statement-president>

<sup>197</sup> ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 35 (2013).

<sup>198</sup> ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 15-16, 19 (2013).

<sup>199</sup> Eugene Volokh, *Assault Weapons Ban, in the Words of Some of Their Supporters*, The Volokh Conspiracy (Dec. 19, 2012), <http://www.volokh.com/2012/12/19/assault-weapons-bans-in-the-words-of-some-of-their-supporters/>

The way to accomplish this cultural shift of reversing the trend line is not through generating mass concern following mass shootings, and trying to pass through the backdoor proposals that people did not want before. This makes gun owners not trust gun controllers—with good reason. As Professor Winkler noted, “Many gun owners might have supported background checks had they not been distracted by the assault weapons issue, which caused them to distrust gun control proponents even more than before.”<sup>200</sup> Why should they? Every time there is a tragedy, and support for background checks is strong, gun controllers aim high, and try to reintroduce failed gun control bills. Professor Winkler reminds us that the ultimate aim of “disarmament is an unrealistic goal.”<sup>201</sup> The fact that “[g]uns are permanent in America” is “perhaps the most important” fact that the “gun ban supporters failed to grasp.”<sup>202</sup> As long as this fear persists, and remains the obvious end-goal of these groups, the NRA’s fanning the flames of confiscation remains viable.

## Conclusion

Our goals for this article were modest. First, we aimed to bring some definitional and empirical clarity to the debate over mass shootings. In short, these tragedies are very, very rare, constitute a tiny sliver of sensationalized gun deaths, and are not happening more frequently. Second, we ventured to offer several explanations as to why these rare deaths occupy such heightened scrutiny in our society. Due to behavioral heuristics and innate cognitive biases, we tend to overweigh the risk of rare and unfamiliar events, especially when the impact of these events jibes with our cultural predispositions, and impacts those who are similar to us. Third, we chronicled the various stages of the shooting cycle: tragedy, introspection, action, divergence, and status quo. This is not to say that all mass shootings trigger the same stages. Also, many other similar tragedies that yield legislative responses travel a similar arc. Fourth, we explained how concepts like emotional capture and regression to the mean illustrate why support for stricter gun control spikes after a mass shooting, but that support fades with time. Fifth, we documented the shooting cycle in the year after the horrific massacre in Newtown. During this time, as support for gun control waned, opposition to gun control waxed. This regression to the mean helps explain, in part, the defeat of the proposed gun control legislation.

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

This leaves us with a question we do not answer. Can this cycle be broken? In other words, is it possible for support of gun control laws among Americans to remain high enough, not just to pass something four months later, but to make Americans appreciate the law for years

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<sup>200</sup> <sup>200</sup> Adam Winkler, *Who Killed Gun Control? The gun-control bill is dead. Why?*, New Republic (Apr. 1, 2013), <http://www.newrepublic.com/article/112946/gun-control-failure-2013-who-responsible>

<sup>201</sup> ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 19 (2013).

<sup>202</sup> ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 22 (2013).

to come? Breaking the cycle will require a significant cultural shift. Only time will tell if this is possible.