

Recommendations for Improving Firearms Vetting in Massachusetts

Robert C. Devine

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Recommendations for Improving Firearms Vetting in Massachusetts

Robert C. Devine

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ABSTRACT

The United States is in a state of conflict over the ability to obtain firearms as well as their use in highly publicized mass shootings. On December 14, 2012, Adam Lanza obtained several firearms that were lawfully owned by his mother, but were improperly secured. Lanza killed his mother that morning and then drove a short distance to the Sandy Hook Elementary School in Newtown, Connecticut where he murdered twenty-six people, many of whom were small children. Lanza eventually turned a gun on himself before being confronted by responding officers. Though mass shootings are often headlines in this country, the vast majority of misused firearms by the mentally ill are tragically used in suicide. The lessons of these examples must be used to augment current firearms policy in an effort to reduce the availability of firearms to those suffering with afflictions that make them ill-equipped to have access to them. Though the Commonwealth of Massachusetts asks pointed questions in these areas regarding the fitness of the potential license holder, it collects no data whatsoever regarding other full-time household members where a firearm may be kept, nor what measures the licensee takes to ensure its security.

This Article illustrates a policy, grounded in facilitative principles, designed to reduce access to firearms by those mentally incapable of handling them or those with current substance addictions. Key components to the solution's success should rely on increased vetting of the licensee's environment and where lawfully owned firearms will be stored, in combination with assessing the risk factors of having been hospitalized for mental health, drug dependence, or alcohol dependence. This recommendation is merely an expansion of questions already used in the current Massachusetts firearms licensing application and would produce additional factors that a licensing official may consider when determining the suitability of an applicant. It is important to note that this would not be an outright prohibition for a licensee, which would likely be constitutionally impermissible. This Article concludes by reemphasizing the importance of giving licensing officials more information to consider in an effort to lower the risk of lawfully owned firearms ending up in the hands of the mentally ill or violent.

AUTHOR'S NOTE

M.A. Curry College; J.D. Candidate, 2020, University of Massachusetts School of Law. In December of 2012, I had worked in law enforcement for nineteen years and

had seen unimaginable tragedy, but the shooting of innocent children at the Sandy Hook Elementary School was different. I was the father of a five-year-old daughter and thoughts began to swirl through my head about how to keep her safe. The Monday after the shooting, my daughter forgot her school lunch. I was working at the time, so I brought the lunch to her school and found myself engaged in small talk with the school's administrative assistant. I soon realized that I was avoiding leaving, because as long as I was there in uniform, I was between the evils of the world and my little girl. It was a feeling I will never forget and was comparatively so minute compared to those who lost their children. Every parent knows the fears of parenthood, it is a sad state of affairs that this fear must extend into the classroom. This Article is a recommendation to keep the destructive instruments of that day out of the hands of those who look to do harm to the innocent.

I would like to thank my wife Lisa, my son Stephen and my daughter Makenna. Without your support, I would not have taken on the challenge of law school, much less that of writing this Article. I also thank the UMass Law Review editors for their hard work on this Article, as well as Professors Jeremiah Ho and Dwight Duncan for their guidance. I would finally like to dedicate these recommendations to those killed at Sandy Hook Elementary on December 14, 2012. May they rest in peace.

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I. INTRODUCTION

On the morning of December 14, 2012, Adam Lanza killed his sleeping mother, then drove a short distance to the Sandy Hook Elementary School and took the lives of twenty children and six adults. Lanza murdered these people through the use of weapons purchased lawfully by his mother.¹ After the killing spree, as police were enclosing to prevent further carnage, Lanza fatally shot himself before apprehension.² “The mass shootings shocked and traumatized the Newtown community, the State of Connecticut, the nation, indeed the entire world.”³ Questions were asked.⁴ How could this have happened?⁵ Why would someone do such a thing?⁶ How did Lanza, who had shown multiple signs of concerning aberrant behavior⁷, come into possession of these weapons?⁸ On January 3, 2013, Connecticut Governor Daniel P. Malloy attempted to find some answers when he announced the formation of the Sandy Hook Advisory Commission, “[T]o review current policy and make specific recommendations concerning public safety, with particular attention paid to school safety, mental health, and gun violence prevention.”⁹ In forming the Commission, the Governor directed it to “look for ways to make sure our gun laws are as tight as they are reasonable, that our mental health system can reach those that need its help, and that our law enforcement has the tools it needs to protect public safety, particularly in our schools.”¹⁰

¹ SANDY HOOK ADVISORY COMMISSION, FINAL REPORT OF THE SANDY HOOK ADVISORY COMMISSION 10–11 (2015), http://www.shac.ct.gov/SHAC_Final_Report_3-6-2015.pdf [<https://perma.cc/VKB8-8E6T>].

² *Id.* at 12.

³ *Id.* at 1.

⁴ *See generally id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 81.

⁸ *Id.* at 10.

⁹ *Id.* at 1.

¹⁰ *Id.*

As could be expected, many of the issues the Commission investigated were controversial and quite complex.¹¹ Physical barrier safety measures may have been the easiest recommendations to make.¹² Debate raged within the document as to what effect mental illness has on a diagnosable propensity for violence and what measures could be put in place to assist those struggling with these afflictions.¹³ It was also revealed that those with mental illness were more likely to kill themselves than to resort to violence against others.¹⁴ However, illustrated by the areas where many recommendations were not adopted by the State of Connecticut, the real fight involved the United States' great debate around "gun control" and citizens' rights under the Second Amendment to the United States Constitution.¹⁵ Discussion of these rights, of course, starts with the recent Supreme Court decision in *District of Columbia v. Heller*. In *Heller*, the Supreme Court ruled that possession of a firearm is an individual right and that laws impermissibly restricting those rights may be stricken down as unconstitutional.¹⁶ The arguments for and against regulating firearm ownership will be examined further within this Article.

The purpose of this Article is to construct and apply lessons from gun violence tragedies, including Newtown and others, in an effort to provide sensible methods of harm reduction for the Commonwealth of Massachusetts' firearm licensing criteria. The current Massachusetts Firearms Licensing Law has a detailed process of licensure, including basic background checks, along with a requirement that the license holder be deemed "suitable" for possessing firearms.¹⁷ A licensing official's decision to deny a citizen of the Commonwealth a license must meet a standard where they are not "arbitrary or capricious" in order to pass constitutional muster.¹⁸

This traditional standard has prevailed despite multiple challenges. In *Chief of Police v. Holden*, the statute in question governed the

¹¹ See generally *id.* (highlighting the multiple policy recommendations that were made for the state to consider, with some accepted and others rejected).

¹² *Id.* at 49.

¹³ *Id.* at 169–77.

¹⁴ *Id.* at 178.

¹⁵ *Id.* at 65.

¹⁶ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

¹⁷ MASS. GEN. LAWS ch. 140, § 131 (2018).

¹⁸ *Id.*; *Heller*, 554 U.S. at 631.

suitable person standard for eligibility to obtain a license to conceal and carry a firearm. The court held that the statute was not void for vagueness and thus the statute did not violate the Second Amendment.¹⁹ Massachusetts also employs the concept of foreseeability within the law, requiring licensees to secure their firearms and punishing those whose firearms could be accessed without an “unforeseeable trespass” by another.²⁰

This Article recommends that the Commonwealth of Massachusetts shore up a hole in its requirements for firearms licensing to keep weapons out of the hands of the violently mentally ill, thereby making its citizens safer. In order to accomplish this, it is recommended that the Commonwealth expand two suitability questions to the current Massachusetts firearms licensing application as follows:

1. Has any current, full-time household member ever been committed to a hospital or institution for mental illness, alcohol, or substance abuse?²¹
2. If the answer to the first question is yes, what safety measures have been taken in the home to ensure that lawfully owned firearms do not end up in the possession of said person?²²

Affirmative answers would not lead to an outright prohibition from licensure. In an effort to maintain the constitutionality of the regulation, the aforementioned proposition would be used in conjunction with many factors in determining the overall suitability of the licensee. If a potential licensee is denied, the reasons must be clearly stated because the license holder must be given an opportunity to correct any identified deficiencies, and decisions may not be arbitrary or capricious in continuity with current Massachusetts law.²³ Further, license holders should be required to demonstrate the safety features presented in Question Two for an on-site licensing official

¹⁹ Chief of Police of Worcester v. Holden, 26 N.E.3d 715, 728–29 (Mass. 2015).

²⁰ MASS. GEN. LAWS ch. 140, § 131L (2018).

²¹ See generally DEP’T OF CRIM. JUST. INFO. SERVS., COMMONWEALTH OF MASS. EXEC. OFF. OF PUB. SAFETY & SECURITY, MASSACHUSETTS RESIDENT LTC/FID/MACHINE GUN APPLICATION (2015) [hereinafter MASSACHUSETTS RESIDENT GUN APPLICATION].

²² *Id.*

²³ MASS. GEN. LAWS ch. 140, § 131 (2018).

upon request. Mitigating foreseeable risks would serve as an effort to facilitate the harm reduction of a licensed firearm finding itself in the hands of an individual who may be violent or who may harm themselves due to a mental illness or substance abuse problem.²⁴

In order to make the aforementioned recommendations, an examination of the Second Amendment of the United States Constitution, in conjunction with *Heller* and the current issues of the legal atmosphere is necessary. Furthermore, considering firearm violence in the United States, in particular Newtown's incident, Connecticut's firearm laws and Massachusetts's firearm licensing laws should be taken under consideration as well. After thorough research, a critical analysis will then be completed, examining the pros and cons offered by opposing sides in regard to firearms ownership and the government's efforts to regulate it. The stigma created by the media also needs to be reviewed for bias toward the mentally ill as being per se violent and there must be an explanation of the fact that mental illness alone does not lead one to be so. Further analysis will show that most people who have mental illness, access to a firearm, and a compulsion toward a violent act commit suicide. Additionally, research will show that the combination of mental illness and drug and/or alcohol addiction does increase the risk of violence. Finally, a recommendation will be offered as to what can be done to prevent foreseeable tragedies.

II. BACKGROUND: THE RIGHT TO BEAR ARMS, THE GREAT DEBATE

A. The Second Amendment to the United States Constitution

The Second Amendment of the United States Constitution guarantees that, because “a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”²⁵ In the twenty-first century, there has been endless debate over “its purpose, its scope, and its place in modern society,” even though the wording seems simple in nature.²⁶ Theories interpreting the Second Amendment were generally broken

²⁴ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 182–92.

²⁵ U.S. CONST. amend. II.

²⁶ Brian Driscoll, *Who is Armed, and by What Authority? An Examination of the Likely Impact of Massachusetts Firearm Regulations After McDonald and Heller*, 45 SUFFOLK U. L. REV. 91, 94–95 (2011).

into two categories, those being: (1) the “individual right” theory, in which the Second Amendment is regarded as protecting an individual’s right to own and carry firearms regardless of a person’s being a member of a militia, and (2) the “collective right” theory, which argues that the Second Amendment is based on state-controlled militia service.²⁷ Until recently, the Second Amendment was seen as constraining the actions of the federal government, while leaving the states to establish their own rights and regulations regarding firearms ownership.²⁸ The Second Amendment became fully applicable to the states by virtue of the Fourteenth Amendment to the Constitution.²⁹

Congress passed the Gun Control Act of 1968, in large part due to the high profile assassinations of Dr. Martin Luther King, Jr. and Robert F. Kennedy.³⁰ This marked the first time Congress decided to prohibit defined classes of people from purchasing firearms.³¹ These prohibited classes included “convicted felons, adjudicated persons with mental illness and drug abusers.”³² Regarding persons with mental disabilities, the law specifically prohibits anyone from “selling or disposing of any firearm to any person he knows or has reason to believe ‘has been adjudicated as a mental defective or has been committed to any mental institution.’”³³ The federal Bureau of Alcohol, Tobacco and Firearms has put forth a definition for the term “adjudicated as a mental defective” as:

[A] determination by a court, board, commission or other lawful authority that as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, a person is a danger to himself or others or lacks the mental capacity to manage his own affairs. The term also includes a

²⁷ *Id.*

²⁸ *Id.*

²⁹ DOUGLAS A. RANDALL & DOUGLAS E. FRANKLIN, *Municipal Law and Practice*, in 18A MASSACHUSETTS PRACTICE SERIES § 16.10 (5th ed. 2018).

³⁰ Jane D. Hickey, *Gun Prohibitions for People with Mental Illness—What Should the Policy Be?*, 32 DEV. MENTAL HEALTH L. 1, 2 (2013).

³¹ *Id.*

³² *Id.*

³³ *Id.*

*finding of insanity by a court in a criminal case and incompetency to stand trial.*³⁴

It is important to note that the federal Gun Control Act only creates a baseline for restrictions on firearms that cross state lines.³⁵ With that baseline firmly established, states may create other restrictions that would make firearms more difficult to obtain, misuse by accident, or use in the commission of a crime.³⁶ States can decide to regulate firearms by prohibiting possession or transfer by certain classifications of people or in certain locales such as school or government buildings, but states may not enact a blanket ban on arms.³⁷

In 1993, Congress passed the Brady Handgun Violence Prevention Act (“Brady Act”), named for President Reagan’s press secretary, who was seriously wounded during an assassination attempt on the President in 1981.³⁸ This Act established the National Instant Criminal Background System and now required citizens buying firearms from federally licensed dealers to pass a background check prior to purchase.³⁹ These background checks defined the following classes as prohibited persons: “convicted felons; fugitives; illegal residents; unlawful users of controlled or prohibited substances; individuals dishonorably discharged from the Armed Forces; individuals convicted of, or subject to compliance with a protective order in response to, domestic abuse; and individuals adjudicated as mentally ill.”⁴⁰

B. The *Heller* Case and the Current Legal Climate

In *District of Columbia v. Heller*, the Supreme Court addressed the constitutionality of the District of Columbia’s firearm-storage law and, as a result, the meaning of the Second Amendment.⁴¹ The majority opinion, written by Justice Scalia, methodically broke down the text of

³⁴ *Id.*

³⁵ Katherine L. Record & Lawrence O. Gostin, *What Will It Take? Terrorism, Mass Murder, Gang Violence, and Suicides: The American Way, or Do We Strive for A Better Way?*, 47 U. MICH. J.L. REFORM 555, 567 (2014).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Hickey, *supra* note 30, at 3.

³⁹ *Id.*

⁴⁰ Record & Gostin, *supra* note 35, at 560–61.

⁴¹ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

the Second Amendment in an attempt to determine its original meaning.⁴² The Court determined that the Second Amendment was intended to recognize and codify a protected, “preexisting individual right at common law to bear arms.”⁴³ The *Heller* court ruled that any public safety regulations may not impair an individual’s basic Second Amendment rights.⁴⁴ With that, however, the opinion noted that “[T]he Second Amendment does not guarantee an unlimited right to bear arms” that would “invalidate all firearm regulation.”⁴⁵

The “Heller [court] took enormous strides in defining the Second Amendment,” but unfortunately “chose not to establish a level of judicial scrutiny by which courts could evaluate Second Amendment restrictions.”⁴⁶ In order to make the determination as to whether a state’s firearms control law is constitutional, the court employed a two-step analysis.⁴⁷ The court begins their analysis by asking “[W]hether the regulation infringes upon a Second Amendment right,” and “If it does, the court then determines whether the regulation ‘passes muster under the appropriate level of constitutional scrutiny.’”⁴⁸ Constitutional scrutiny ranges from rational basis being the lowest level of review to strict scrutiny being the highest level and intermediate scrutiny falls in between the two.⁴⁹ The *Heller* court applied intermediate scrutiny “which requires the Government to show there is a substantial relationship between the regulation and the government interest the regulation is protecting.”⁵⁰ Though the *Heller* court defined the parameters for some restriction on firearms possession, the decision only applied to the federal jurisdiction, as Washington, D.C. is governed by federal law.⁵¹

⁴² Driscoll, *supra* note 26, at 110.

⁴³ *Heller*, 554 U.S. at 577–606; Driscoll, *supra* note 26, at 110.

⁴⁴ *Heller*, 554 U.S. at 626–30; Driscoll, *supra* note 26, at 110.

⁴⁵ Driscoll, *supra* note 26, at 110.

⁴⁶ *Id.* at 111.

⁴⁷ Ashley Mata, *Kevlar for the Innocent: Why Modeling Gun Regulation After Great Britain, Australia, and Switzerland Will Reduce the Rate of Mass Shootings in America*, 45 CAL. W. INT’L L.J. 169, 204 (2014).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

While *Heller* was a landmark decision in interpreting the meaning of the Second Amendment, it had relatively little impact on Massachusetts.⁵² The Massachusetts Supreme Judicial Court (“SJC”) pointed out the limits of the *Heller* decision and its apparent “lack of impact on the Commonwealth’s gun laws in two cases decided on the same day.”⁵³ In *Commonwealth v. Runyan*, the Massachusetts firearms storage law, a similar statute to the one struck down in *Heller*, was challenged.⁵⁴ The trial court, using the *Heller* decision as a guide, found that the Massachusetts safe-storage requirement did violate the defendant’s Second Amendment rights.⁵⁵ The SJC reversed this decision while holding that the Second Amendment did not yet apply to the states and that the Massachusetts Declaration of Rights still governed firearms ownership in Massachusetts under Article XVII.⁵⁶ Additionally, in *Commonwealth v. Depina*, the Massachusetts “licensing requirement for carrying a loaded weapon by contending that the statute impaired [an individual’s] right to bear arms under the Second Amendment.”⁵⁷ The SJC again “declared the Second Amendment inapplicable, while rejecting the defendant’s argument, relying on the *Davis* court’s collective-rights interpretation of the right protected by article XVII.”⁵⁸

Massachusetts colonists distrusted standing armies and preferred militias for protection.⁵⁹ Article XVII expresses this distrust stating, “[T]he declared right to keep and bear arms is that of the people, the aggregate of citizens; the right is related to the common defense; [which] in turn points to service in a broadly based, organized militia.”⁶⁰ The SJC ruled in *Commonwealth v. Davis* that Article XVII was not directed to “guaranteeing individual ownership or possession of weapons” outside of militia service.⁶¹ This would all change with

⁵² Driscoll, *supra* note 26, at 111.

⁵³ *Id.*

⁵⁴ *Id.*; see also *Commonwealth v. Runyan*, 922 N.E.2d 794, 795–96 (Mass. 2010).

⁵⁵ *Runyan*, 922 N.E.2d at 795-96; Driscoll, *supra* note 26, at 111.

⁵⁶ Driscoll, *supra* note 26, at 111.

⁵⁷ *Id.* at 111–12; see also *Commonwealth v. Depina*, 922 N.E.2d 778, 789 (Mass. 2010).

⁵⁸ Driscoll, *supra* note 26, at 112; see also *Depina*, 922 N.E.2d at 789–90.

⁵⁹ *Commonwealth v. Davis*, 343 N.E.2d 847, 848 (Mass. 1976).

⁶⁰ *Id.* at 848–49.

⁶¹ *Id.* at 849.

the Supreme Court ruling in *McDonald v. City of Chicago*, where the Court held that the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller* to keep and bear arms for the purpose of self-defense, thereby applying the *Heller* ruling to the states.⁶²

C. Firearms Violence in the Last Twenty Years

The United States Department of Justice's Bureau of Justice Statistics reports that "[T]he number of firearms homicides in 2011 declined 39% from its all-time high in 1993," and "Although the number of firearms crimes has declined over time, the percentage of all violent crimes involving the use of a firearm has not changed substantially (declining from 9% in 1993 to 8% in 2011)." ⁶³ "Handguns were responsible for the majority of both homicide and nonfatal violence," with handguns being used in 73% of all firearms homicides in 2011.⁶⁴ In addition, approximately nine out of ten non-fatal violent crimes were also committed via handgun between the years of 1994 to 2011, with the remainder of the gun violence reported being committed with a shotgun or a rifle.⁶⁵

In the United States there have been over 110 active shooter events ("ASE") since the 1999 Columbine High School shooting,⁶⁶ with the average ASE lasting about twelve minutes, though 37% of these last less than five.⁶⁷ The occurrence rate for an ASE in the United States was once every other month between 2000 and 2008, but this has increased to more than once per month between 2009 and 2013.⁶⁸

School violence is defined as "youth violence that occurs on school property, on the way to or from school or school-sponsored events, or during a school-sponsored event."⁶⁹ According to the Center

⁶² *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

⁶³ Hickey, *supra* note 30, at 5.

⁶⁴ *Id.*

⁶⁵ *Id.* at 6.

⁶⁶ Mata, *supra* note 47, at 171. The FBI defines an ASE as "'one or more persons engaged in killing or attempting to kill multiple people in an area occupied by unrelated individuals, one of which must be unrelated to the shooter,' with the primary motive being mass murder." *Id.*

⁶⁷ *Id.* at 172.

⁶⁸ *Id.*

⁶⁹ CTRS FOR DISEASE CONTROL & PREVENTION, UNDERSTANDING SCHOOL VIOLENCE: FACT SHEET, (2016),

for Disease Control (“CDC”), youth violence includes various behaviors such as bullying, pushing and shoving, as well as more serious forms of violence.⁷⁰ The occurrence of a school related violent death is actually rare.⁷¹ During the 2012-2013 school year, thirty-one homicides of school-age youth (ages five to eighteen years old) occurred at school, and less than 2.6% of all youth homicides occur on school grounds.⁷² With that said, there were about 486,400 reported nonfatal violent victimizations at school among students between the ages of twelve and eighteen years of age during the 2014 school year.⁷³ Multiple factors influence the risk of a youth engaging in violence at school, including a “[p]rior history of violence; [d]rug, alcohol, or tobacco use; [a]ssociation with delinquent peers; [p]oor family functioning; [p]oor grades in school; [and] [p]overty in the community.”⁷⁴ The CDC has been collecting data on school-associated violent deaths since 1992, finding that a majority of school-associated violent deaths occur during school transition times (those immediately before and after the school day and during lunch), that violent deaths are more likely to occur at the start of a semester, that almost half of homicide perpetrators gave some type of warning signal, that firearms used in school-associated homicides and suicides came “primarily from the perpetrator’s home or from friends or relatives,” and finally that homicide is the second leading cause of death among youth between the ages five and eighteen.⁷⁵ Though violent deaths at school are rare, they are massively “tragic events with far-reaching effects on the school population and surrounding community.”⁷⁶ Even when an event is attenuated from a particular school district, students and their

https://www.cdc.gov/violenceprevention/pdf/school_violence_fact_sheet-a.pdf
[<https://perma.cc/E9MX-6RUJ>] [hereinafter UNDERSTANDING SCHOOL VIOLENCE: FACT SHEET].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*; see also *School-Associated Violent Death Study*, Study on Violence Prevention, CTRS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ViolencePrevention/youthviolence/schoolviolence/SAVD.html> [<https://perma.cc/JWU6-XX45>] (last visited Nov. 28, 2018).

⁷⁶ Todd A. Demitchell, *Locked Down and Armed: Security Responses to Violence in Our Schools*, 13 CONN. PUB. INT. L.J. 275, 279 (2014).

families can feel an increased fear, which can “negatively affect student attendance and grades.”⁷⁷ Lindsey Wylie, in *Assessing School and Student Predictors of Weapons Reporting*, contends that in spite of the preceding data, students are actually more fearful of being attacked in school than outside of it.⁷⁸

In the wake of Columbine, Virginia Tech University, and now Sandy Hook, a significant policy change has taken place where security has become essential in most of our school systems.⁷⁹ Traditionally, school policies dealing with student behavior were characterized by discipline and safety. Now, the notion of security, once thought to be only of police and military concern, has become a cornerstone of educational policy and planning.⁸⁰

D. Sandy Hook

On December 11, 2012, Nancy Lanza traveled from her home in Newtown, Connecticut to New Hampshire for a short trip away.⁸¹ Her son, Adam Lanza, had stayed behind.⁸² Before departing, Nancy told some friends that her trip “was intended to serve as both a respite from the difficulties of being [Adam’s] mother and as an experiment in leaving [Adam] alone for longer periods of time.”⁸³ She checked into the Omni Mount Washington Resort on Tuesday, December 11th, remained at the Omni until just after noon on December 13th, then traveled back to her home arriving at approximately 10:00 p.m. the same night.⁸⁴ On December 14th, between the hours of 8:00 a.m. and 9:00 a.m., “Adam went into his mother’s bedroom and shot her in the head four times with a .22 caliber Savage Mark II bolt-action rifle that she had lawfully purchased,” but she had left unsecured allowing Adam to gain access to it.⁸⁵ He left the rifle on the floor next to her bed.⁸⁶

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 281.

⁸⁰ *Id.*

⁸¹ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 10.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

Adam then drove the 2010 Honda Civic that his mother had bought for him to Sandy Hook Elementary School, which he had attended as a child.⁸⁷ He brought the following weapons: a semi-automatic Sig Sauer P226, 9mm pistol; a Glock 20, 10mm semi-automatic pistol; a Bushmaster Model XM15-E2S rifle; and an Izhmash Saiga-12 shotgun.⁸⁸ In addition, he also had over 400 rounds of ammunition and several high capacity magazines duct-taped together in a tactical configuration, capable of holding a total of 60 rounds of 5.56 mm ammunition.⁸⁹ Nancy Lanza lawfully purchased all of these weapons and the ammunition.⁹⁰ Adam arrived at Sandy Hook Elementary just before 9:30 a.m., where approximately 489 students and 82 staff members were going about the school day.⁹¹

He parked his car in a “No Parking” zone and walked up to the front entrance, carrying with him the Bushmaster rifle, the Sig Sauer and Glock pistols, and a large supply of ammunition for the three weapons.⁹² Finding the front doors of the school locked, Lanza used the Bushmaster rifle to shoot out a plate glass window on the right side of the entrance doors to the front lobby. Upon calmly entering the building, he turned to his left, facing a hallway with administrative offices and classrooms on each side.⁹³

As shots rang out, the school’s principal Dawn Hochsprung and school psychologist Mary Sherlach rushed into the hallway from room 9, where a meeting was being held.⁹⁴ Another staff member soon followed.⁹⁵ Lanza shot and killed Hochsprung and Sherlach in the hallway while wounding the other staff member.⁹⁶ She laid still in the hallway momentarily, before crawling back into room 9 and holding the door shut.⁹⁷ Another staff member at the far end of the hallway was

⁸⁷ *Id.*

⁸⁸ *Id.* at 10–11.

⁸⁹ *Id.* at 11.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

struck in the foot by a bullet and retreated into a nearby classroom.⁹⁸ The first 911 call from the school was made at 9:35:39 a.m.⁹⁹ The Newtown Police Department immediately responded, with the first officer arriving at the rear of the school at 9:39:00 a.m.¹⁰⁰

A responding team of police officers first gained entry to the school at 9:44:50 a.m., less than eleven minutes after the first 911 call for help was received.¹⁰¹ While police were responding, Lanza entered the main office, where staff members in hiding heard him open the office door, walk in, and then leave.¹⁰² He walked down the hall and entered classrooms 8 and 10 occupied by first graders.¹⁰³ A substitute teacher, Lauren Rousseau, and a behavioral therapist, Rachel D'Avino, were present in room 8, along with sixteen children.¹⁰⁴ Using the Bushmaster rifle, Lanza gunned down and murdered Rousseau, D'Avino, and fifteen of the children.¹⁰⁵ Police investigators recovered eighty expended 5.56 mm bullet casings from this room.¹⁰⁶

In room 10, there was a teacher, Victoria Soto, a behavioral therapist, Anne Marie Murphy, and sixteen students.¹⁰⁷ Lanza entered that room and again used the Bushmaster rifle to kill Soto, Murphy, and five students.¹⁰⁸ Nine children were able to escape from the classroom and survived, either because Lanza stopped shooting in order to reload or because his weapon jammed.¹⁰⁹ Two other children were left uninjured in the classroom.¹¹⁰ After these murders, Lanza killed himself at approximately 9:40 a.m. with a single shot to the head from the Glock pistol he was carrying.¹¹¹ His body was found in room

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 11–12.

¹⁰¹ *Id.* at 12.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

10 where police recovered forty-nine expended 5.56 mm shell casings, and one 10 mm casing.¹¹²

E. Connecticut Firearms Law and the Loopholes Found at the Time of the Shooting

When the Sandy Hook Commission looked into licensing deficiencies in the state of Connecticut, it found some troubling facts.¹¹³ At the time, Connecticut law required registration and permits to own and carry certain firearms, but firearms could also be legally obtained through loopholes without a permit or registration.¹¹⁴ Due to this, the Connecticut State Police reported that there are approximately 1.4 million registered firearms in the State of Connecticut, but incredibly, there could be up to 2 million unregistered.¹¹⁵ The Commission found the discrepancies in regard to permitting and registration of firearms to be “not only unwarranted, but shocking.”¹¹⁶ As a result, the Commission made several recommendations, including “mandatory background checks on the sale or transfer of any firearm, including long guns, at private and gun show sales,” which was later adopted.¹¹⁷ While it was not adopted, the Commission also recommended requiring registration, including a certificate of registration for every firearm, to be issued subsequent to the completion of a background check, which would be separate and distinct from a permit to carry.¹¹⁸ Moreover, it was recommended, but unfortunately not adopted, to require firearms permits to be renewed on a regular basis, with the renewal process including a test of firearms handling capacity as well as an understanding of applicable laws and regulations.¹¹⁹ Under existing Connecticut law, a firearms permit is good for five years and may be renewed without any of these requirements.¹²⁰ The Commission further proposed that the State develop and update a “‘best practices’ manual and require that all

¹¹² *Id.*

¹¹³ *Id.* at 64.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

firearms in a home be stored in a locked container and adhere to these best practices; with current minimum standards featuring a tamper-resistant mechanical lock or other safety [] device when they are not under the owner's direct control or supervision.”¹²¹ The proposal would make the owner directly responsible for securing any key used to gain access to the locked container.¹²²

At present, no person may obtain a firearms permit in Connecticut if: convicted of a felony or a misdemeanor crime of domestic violence involving the use or threatened use of physical force or a deadly weapon, they are less than twenty-one years of age, they are subject to a protective or restraining order, convicted of drug offenses, they have been convicted as a delinquent for the commission of a serious juvenile offense, they have been discharged from custody within the preceding twenty years after having been found not guilty of a crime by reason of mental disease or defect, they have been confined in a hospital for persons with psychiatric disabilities within the previous sixty months by order of a probate court, they have been voluntarily admitted to a hospital for persons with psychiatric disabilities within the preceding six months for care and treatment of a psychiatric disability and not solely for alcohol or drug dependency, subject to a firearms seizure order issued pursuant to Connecticut General Statute Section 29-38c after notice and an opportunity to be heard has been provided to such person, they are an alien illegally or unlawfully in the United States, or for any federal disqualifiers listed in 18 U.S.C. 44.¹²³

Connecticut law also currently authorizes police officers, “upon securing a warrant, to seize firearms from anyone who poses a risk of imminent personal injury to self or others,” provided “probable cause exists and that there is no reasonable alternative to prevent such imminent harm.”¹²⁴ The law does not single out a psychiatric history as grounds for seizure, but rather incorporates it as one of many factors that a court may consider in determining whether a “person's recent threats or acts of violence toward self or others suffice to find probable cause for seizure.”¹²⁵

¹²¹ *Id.* at 68.

¹²² *Id.*

¹²³ CONN. ST. POLICE SPECIAL LICENSING & FIREARMS UNIT, YOUR GUIDE TO FIREARMS AND PERMITS IN CONNECTICUT 1 (2013).

¹²⁴ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 189–90.

¹²⁵ *Id.* at 190.

F. Current Massachusetts Firearms Licensing Law

Article XVII of the Massachusetts Declaration of Rights secures a right to “keep and bear arms for the common defense.”¹²⁶ In *Commonwealth v. Davis*, “[T]he SJC interpreted article XVII to preserve a collective right to gun ownership for the Commonwealth’s citizens, rather than an individual right, and stated that article XVII extends protection to gun ownership conditioned upon the owner’s connection to the Commonwealth’s militia.”¹²⁷ Moreover, the *Davis* court “suggested that some form of regulatory authority would remain, even if the Second Amendment was applied to the states.”¹²⁸ Shortly thereafter, in *Commonwealth v. Jackson*, the SJC found that the rise in violent-crime shown in statistical data gave Massachusetts a reasonable basis to use gun control laws as a “necessary and legitimate tool” to combat rising violent-crime in Massachusetts.¹²⁹ To that end, the legislature “established a comprehensive scheme for regulating firearm ownership in the Commonwealth. . . . [where] owners must be licensed to own firearms [and] if the owner moves, he or she must provide written notification to the municipality’s chief of police within thirty days of arrival.”¹³⁰ Additionally, Massachusetts law “further restricts a licensee’s ability to carry firearms, and also establishes safe-storage requirements to prevent unauthorized access to legally owned firearms.”¹³¹ Statutory disqualifications were put in place that “permanently prevent a person from acquiring a firearms license, including past criminal history, prior firearms or drug offenses, mental health issues, and evidence of drug or alcohol addiction [requiring inpatient treatment].”¹³²

Licenses to carry firearms may be issued to a “suitable person, who has good reason to fear injury to his person or property, or for any other proper reason,” and is revocable at will.¹³³ In Massachusetts, the licensing authority is required to conduct a two-step inquiry when

¹²⁶ Driscoll, *supra* note 26, at 95.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 96.

¹³⁰ *Id.*

¹³¹ *Id.* at 96–97.

¹³² *Id.* at 97.

¹³³ RANDALL & FRANKLIN, *supra* note 29, at § 16.10.

processing a license to carry a firearm in order to determine the applicant's eligibility, looking at the applicant's personal "suitability" for gun ownership and considering whether the applicant has a "proper purpose" for carrying a firearm.¹³⁴ Police chiefs have very broad discretion in assessing this and in issuing firearms licenses.¹³⁵ Massachusetts General Law states,

*The licensing authority may deny the application or renewal of a license to carry, or suspend or revoke a license issued under this section if, in a reasonable exercise of discretion, the licensing authority determines that the applicant or licensee is unsuitable to be issued or to continue to hold a license to carry. A determination of unsuitability shall be based on: (i) reliable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety; or (ii) existing factors that suggest that, if issued a license, the applicant or licensee may create a risk to public safety.*¹³⁶

If a chief of police denies either the issuance or reinstatement of a firearms license, the applicant may appeal by showing "that there was no reasonable grounds for denying, suspending or revoking the license" by proving that the decision was "arbitrary, capricious, or an abuse of discretion."¹³⁷ The burden of proof in making this showing is on the denied applicant and there is no right to a jury trial in Massachusetts firearms licensing matters.¹³⁸ In order to determine suitability, a licensing authority may require an applicant to provide supplemental information in addition to the standard application materials, such as letters of recommendation, a doctor's note, or a shooting test.¹³⁹ Additionally, local policies of a particular licensing authority can dictate whether the licensing authority will issue a

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ MASS. GEN. LAWS ch. 140, § 131(x) (2018).

¹³⁷ RANDALL & FRANKLIN, *supra* note 29, at § 16.10.

¹³⁸ *Id.*

¹³⁹ Driscoll, *supra* note 26, at 99–100.

license with restrictions.¹⁴⁰ The online Massachusetts firearms license application processing includes “a state and federal background check, a fingerprint based background check, and a check with the Department of Mental Health.”¹⁴¹ When filling out an initial license application, a series of potential disqualifying questions must be answered under the pains and penalties of perjury and includes the question, “Have you ever been committed to any hospital or institution for mental illness, or alcohol or substance abuse?”¹⁴²

III. AN APPROACH FOR IMPROVING FIREARMS SAFETY THROUGH LICENSURE

A. Arguments for Stricter Licensing

The Sandy Hook Elementary Commission Final Report recognized that, “In 21st century America, certain topics are destined to divide us,” and that how we as a nation manage firearms is just such a topic.¹⁴³ The report took the time to highlight that almost no topic in American politics inflames such passionate reactions on “message boards” more than firearms ownership does.¹⁴⁴ Even our own Supreme Court had difficulty agreeing on what the concept of a “right to bear arms” actually is based upon the 5-4 decision that decided the aforementioned *Heller* case.¹⁴⁵ Because of this, the Commission, charged with evaluating the availability and accessibility to firearms and ammunition in Connecticut, applied what they called a “rational analysis” approach as to what firearms were available to citizens and what that meant for the security of the community at large.¹⁴⁶ The Commission took great pains to expressly state that their findings were not grounded in any form of “dogma” or “a particular ingrained world view.”¹⁴⁷ Following the Sandy Hook Elementary School murders, the

¹⁴⁰ *Id.* at 100.

¹⁴¹ *See generally* APPLY FOR A FIREARMS LICENSE, <https://www.mass.gov/how-to/apply-for-a-firearms-license> [<https://perma.cc/ZB5R-4CRK>] (last visited Nov. 25, 2018).

¹⁴² MASSACHUSETTS RESIDENT GUN APPLICATION, *supra* note 21.

¹⁴³ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 61.

¹⁴⁴ *Id.*

¹⁴⁵ *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

¹⁴⁶ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 61.

¹⁴⁷ *Id.*

national debate over gun control and what should be done raged anew.¹⁴⁸ As a result, President Barack Obama named Vice President Joe Biden to lead a “Gun Violence Task Force” to examine the issue.¹⁴⁹ In response to this action, on January 16, 2013, the President proposed several measures, including “stronger background checks for weapons purchases; banning military-style assault weapons and high capacity magazines; conducting more research on gun violence; promoting common-sense gun safety; improving treatment for mental illness for students; and training additional health professionals to work with children.”¹⁵⁰ These recommendations have become the subject of much debate and discourse due to the fact that gun ownership or possession in the United States is the highest in the world at “nearly one gun on average for every resident” according to the Sandy Hook Elementary Commission Final Report.¹⁵¹ Though the report acknowledges the fact that “[M]ost guns are lawfully owned by law abiding persons who use them for recreational activities, such as hunting and target practice, and/or for self-defense,” it also points out that “[M]any guns are owned or possessed illegally or, even if legal, are used for unlawful purposes” such as Adam Lanza’s.¹⁵²

Katherine Record and Lawrence Gostin, authors of *What Will It Take? Terrorism, Mass Murder, Gang Violence, and Suicides: The American Way, or Do We Strive for A Better Way?*, take it a step further by highlighting the “ineffectiveness of our current web of gun regulations,” stating that “[V]ery dangerous people can and do access very powerful weapons, and they always will, so long as those weapons are easily available.”¹⁵³ The Sandy Hook Final Report illustrates that “[R]ates of gun violence in general, and particularly gun fatalities, correlate strongly with higher rates of gun ownership.”¹⁵⁴ It further illustrates that “Whereas the United States has both extremely high rates of gun ownership and high rates of firearm-related deaths, Japan and the United Kingdom have very low gun ownership rates and

¹⁴⁸ Demitchell, *supra* note 76, at 283.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 61.

¹⁵² *Id.* at 61–62.

¹⁵³ Record & Gostin, *supra* note 35, at 558.

¹⁵⁴ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 173.

correspondingly low rates of gun-related deaths.”¹⁵⁵ In fact, research has found “a significant positive correlation between guns per capita per country and the rate of firearm related deaths, with Japan being on one end of the spectrum and the US being on the other.”¹⁵⁶ Similar research found that a number of countries dramatically reduced their rates of gun violence with various forms of heightened firearms regulation, noting that Australia, as an example, has seen a significant reduction in firearms-related deaths since it banned all automatic and semiautomatic long guns while instituting strict licensing and registration requirements for all legal firearms.¹⁵⁷ As a result of these control measures, there have been zero mass shootings in Australia since 1996, and the rate of firearms mortality decreased from approximately .27 per 100,000 to .13 per 100,000.¹⁵⁸ In comparison, death by firearm is over twenty times more likely to occur in the United States than in Australia.¹⁵⁹ Additionally, Ashley Mata, in *Kevlar for the Innocent: Why Modeling Gun Regulation After Great Britain, Australia, and Switzerland Will Reduce the Rate of Mass Shootings in America*, reports that “[W]hile the United States struggles with ASE and mass murder, other countries have found a solution to the same problem.”¹⁶⁰ Mata also notes Australia’s success on this matter and points out that “Great Britain has faced only one mass shooting since enacting strict gun regulations in 1997,” while “Switzerland, which has a liberal approach to gun control, has seen only three since 2001.”¹⁶¹ Great Britain maintains highly restrictive policies that effectively ban most firearms and create highly restrictive standards to obtain an ownership certificate.¹⁶² Australia requires completion of an educational course on firearms law before issuing a firearm permit.¹⁶³ Switzerland’s firearms licensing laws are regarded as the laxest of these nations, “but still requires applicants to pass a written and practical examination demonstrating their [basic]

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Mata, *supra* note 47, at 174.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 174–75.

knowledge and skill with firearms before approving an open carry application.”¹⁶⁴ As a small sample, these countries, applying these measures, have had verifiable success in preventing and reducing the rates of mass shootings, while the United States seems faced with a growing number of these events.¹⁶⁵

Firearms are not limited to mass shootings or homicides however, they also play a huge role in suicides, as over half of all completed suicides involved a firearm.¹⁶⁶ Additionally, using a gun in a suicide attempt makes it much more likely that the attempt will be successful and result in death.¹⁶⁷ In comparison, suicide gun-related deaths in America outpace those that occur by homicide.¹⁶⁸ In 2010, suicides accounted for 61.2% of the 31,672 deaths caused by firearms in the United States, with homicides accounting for only 35%.¹⁶⁹ This was a continuing trend the next year, where 32,163 firearm related deaths resulted in 19,392 suicides and 11,078 homicides.¹⁷⁰ In fact, mass shootings themselves frequently end with the shooter’s suicide, whether by their own hand or through forcing the hands of law enforcement through a phenomenon known as “suicide by cop.”¹⁷¹

Another reason for increased firearms regulation is the fact that Americans actually think that gun laws are stronger than they actually are and would readily accept many of the proposed restrictions.¹⁷² Record and Gostin also report that “American people do not realize that current legislative proposals suggest the exact restrictions Americans think already exist.”¹⁷³ In fact, polling shows that a majority of Americans mistakenly believe that “individuals on the terrorist watch list are barred from buying arms; individuals must pass a background check for every gun purchase (even at gun shows); high capacity magazines are prohibited; the purchase of unusually large amounts of ammunition triggers federal investigation; and it may be

¹⁶⁴ *Id.* at 175.

¹⁶⁵ *Id.*

¹⁶⁶ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 178.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Record & Gostin, *supra* note 35, at 558–59.

¹⁷³ *Id.* at 559.

illegal to purchase ammunition online.”¹⁷⁴ Though permissible under the Supreme Court’s current interpretation of the Second Amendment, none of these restrictions are currently in place.¹⁷⁵ Since the tragedy at Sandy Hook, “more than 450 bills related to school safety were filed across the nation” to close some of these gaps.¹⁷⁶ These bills were categorized into seven categories including ones involving “gun control.”¹⁷⁷

B. Arguments Against Stricter Licensing

In looking at such things as book sales, letters to the editor, and blog commentaries, one cannot help but come to the conclusion that “gun control” opponents are far more fervently and consistently engaged than are advocates.¹⁷⁸ There are several factors for these declines in public support for more stringent control measures.¹⁷⁹ First, trust in and support for the government has declined within the United States population since the 1960s.¹⁸⁰ Second, American political narratives have increasingly become rights-based.¹⁸¹ “Gun control” opponents are able to produce a fierce resistance to regulation by using the Second Amendment to shape the argument as one of individual rights.¹⁸² Views on gun control are also largely divided along political party lines.¹⁸³ In recent polls, 77% of Democrats supported more stringent firearms regulation, while 23% of Republicans felt that way.¹⁸⁴ However, people on both sides can see how this divide can lead to serious problems for licensed gun owners, as there is no existing universal gun regulation in the United States and each state is able to craft its own policies that give birth to its own local laws.¹⁸⁵

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Demitchell, *supra* note 76, at 284.

¹⁷⁷ *Id.*

¹⁷⁸ William J. Vizzard, *The Current and Future State of Gun Policy in the United States*, 104 J. CRIM. L. & CRIMINOLOGY 879, 887 (2014).

¹⁷⁹ *Id.* at 888.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Mata, *supra* note 47, at 201.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 201–02.

Those in favor of less regulation nationwide argue that significant differences in policy throughout the nation create confusion among the lawful gun owning population, due to the fact that crossing into certain states could potentially turn a lawful possession of a firearm into one that is unlawful.¹⁸⁶ With that said, though *Heller* interprets the Second Amendment as guaranteeing firearms possession as a “personal right,” it did not make that right absolute.¹⁸⁷ The Supreme Court specifically acknowledged that “[S]ociety has the right to regulate gun ownership, possession and use within Constitutionally permissible limits,” and this gives states, like Massachusetts, wide latitude within which to work.¹⁸⁸ To pass constitutional muster, regulation of firearms must consist of a reasonable limitation, that is reasonably necessary to protect public safety or welfare, and such limitations must be substantially related to the ends sought by the state.¹⁸⁹ In sum, “The Second Amendment does not confer on U.S. citizens a broad right to unregulated possession of any types of weapons”; on the contrary, “[T]he right is subject to reasonable regulation for legitimate purposes such as the protection of public health and safety.”¹⁹⁰ By way of illustration, the Second Amendment does not restrain Congress from passing laws prohibiting felons from possessing any firearm, ammunition, or type of explosive.¹⁹¹ These laws are passed because the primary goal of all firearm control legislation is generally “to limit access to deadly weapons by irresponsible persons.”¹⁹² “As a condition precedent to the purchase, carrying, or possession of a weapon, [states] may properly require the obtaining of a license or permit [so long as the licensing process] is reasonable and not prohibitive. Such requirement[s] [for licensing] may be applied to particular classes of persons and weapons.”¹⁹³

¹⁸⁶ *Id.* at 202.

¹⁸⁷ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 62.

¹⁸⁸ *Id.*

¹⁸⁹ William M. Howard, Annotation, *Construction and Application of State Statutes and Local Ordinances Regulating Licenses or Permits to Carry Concealed Weapons*, 12 A.L.R. Fed. 7th Art. 4 (2016).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

In addition to the rights-based arguments against firearms regulation, gun advocates such as Wayne Lapiere, Executive Vice President of the National Rifle Association, argue that the answer to mass shootings is not more gun regulations, it is more guns.¹⁹⁴ Lapiere said, “The only thing that stops a bad guy with a gun is a good guy with a gun,” while calling for armed guards in every school.¹⁹⁵ He goes on to argue that the Secret Service and the Capitol Police protect the President and Congress respectively, but that “[W]hen it comes to our most beloved, innocent, and vulnerable members of the American family, our children, we as a society leave them every day utterly defenseless, and the monsters and the predators of the world know it, and exploit it.”¹⁹⁶ A recent policy recommendation that has stirred tremendous debate is to bring more guns into schools by arming school faculty and administrators as an effort to better protect the educational environment.¹⁹⁷ Representative Louie Gohmert (R-Texas) stated, “I wish to God she had an M-4 in her office locked up so when she heard gunfire she pulls it out and she didn’t have to lunge heroically with nothing in her hands but she takes him out, takes his head off before he can kill those precious kids,” when referring to the principal of Sandy Hook Elementary School.¹⁹⁸ Working in tandem with this line of thinking is the argument that gun-free school zones are invitations to criminals to victimize those within our schools.¹⁹⁹ A school district superintendent, David Thweatt, of Harrold, Texas, made a decision to allow teachers with a permit, to carry on campus and defended it stating, “When the federal government started making schools gun-free zones, that’s when all of these shootings started. Why would you put it out there that a group of people can’t defend themselves? That’s like saying ‘sic’ em’ to a dog.”²⁰⁰ However, the line of thinking that says schools are “easy targets” which attract killers may not hold up when examined more closely.²⁰¹ In a database established by *USA Today* on mass killings in

¹⁹⁴ Demitchell, *supra* note 76, at 283.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 283–84.

¹⁹⁷ *Id.* at 286.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 289.

²⁰⁰ *Id.*

²⁰¹ *Id.*

the United States from 2006 to 2013, it was revealed that the majority of mass killings actually take place away from school settings, taking place instead in private homes, neighborhoods, malls, and other places of business.²⁰² Opponents of arming school employees say that putting more guns in school does not then create safer schools.²⁰³ Kenneth S. Trump, President of the for-profit National School Safety and Security Services, argues that this should not be in the job description for educators when he says, “The majority of teachers want to be armed with textbooks and computers, not guns.”²⁰⁴ Additionally, those charged with school safety, school resource officers, are against such a policy due to the fact that a person openly carrying a gun in an active shooter situation that has not been identified as a police officer, is automatically a suspect that may be shot by police.²⁰⁵ Even if no one is harmed in the confusion, the police must confront the person, losing valuable time to engage the actual threat.²⁰⁶ Nevertheless, advocates like David Kopel, an associate policy analyst with the Cato Institute, offer examples of “real-world programs” in which guns are “successfully” allowed in schools.²⁰⁷ The primary example is Utah, which Kopel asserts from “kindergarten through graduate school, the schools of Utah have been safe from any attempted attack by mass murders.”²⁰⁸ The statute permitting concealed carry privileges in Utah is a “Shall Issue” statute, which allows every licensed gun owner to “carry concealed handguns on any public elementary, secondary, or Utah state university” grounds.²⁰⁹ The policy argument in Utah is that individuals with permits carrying guns into schools and colleges make the students in Utah safe because any citizen could be armed in any school at any time.²¹⁰ Collected data from Utah campuses and K-12 schools show no incidents of the misuse of a firearm by a person with a legal permit anywhere in the state.²¹¹ The data also reveals no

²⁰² *Id.*

²⁰³ *Id.* at 286.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 291.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 287.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

instances of attempted mass murders at any school in Utah.²¹² This argument would seem compelling until it is properly put into context.²¹³ Though one life lost is one too many, as of 2009-2010, there were 98,817 public schools in the United States and the vast majority of these schools have not had to process the horrors of a killing that has occurred on campus.²¹⁴ This seriously calls into question whether the presence of weapons in Utah's 994 public schools provide the causation for the lack of a mass shooting in Utah.²¹⁵

Finally, John Lott, Gary Kleck, and others have generated a new argument that seeks to attenuate the perceived causal link between guns and violent crime.²¹⁶ Kleck argues that "defensive gun use" may actually deter crime.²¹⁷ Kleck, claims that firearms are often used to defend against criminal action and estimates this occurs up to 2.5 million times annually in the United States.²¹⁸ However, these dubious conclusions are based on random telephone surveys that ask recipients generally about the "defensive use of guns."²¹⁹ In the alternative, the National Crime Victims Survey, administered by the Bureau of Justice Statistics, produces an estimate that is closer to 70,000, showing a significantly wide disparity.²²⁰ The line of thinking that says ready access to firearms makes us safer, rather than increases the prospect of tragedy, has largely been discredited by an outsized body of credible evidence.²²¹ Thirty thousand Americans die every year via gunshot, with homicides accounting for approximately one-third of such deaths, while the remainder involved suicides and accidental discharges.²²² In fact, Record and Gostin make an argument that firearms put Americans at greater risk of death than participating in a war, as the number of Americans who were shot dead domestically within the

²¹² *Id.* at 287–88.

²¹³ *Id.* at 288.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Vizzard, *supra* note 178, at 889.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *See* Record & Gostin, *supra* note 35, at 555 (abstract).

²²² *Id.*

United States during a four-month period was greater than the number who died fighting in Iraq for an entire decade.²²³ The *American Journal of Public Health* also debunks this theory, finding that “homicide was more common in areas where household firearms ownership was higher. . . . [and] that states with high rates of gun ownership had disproportionately high numbers of deaths from firearm-related homicides.”²²⁴

C. Efforts to Keep the Mentally Ill from Gaining Possession of Firearms and the Stigma that Can Be Attached to the Label

The *New York Times* wrote “Mr. Trump and Republican lawmakers have long tried to steer the national conversation after mass shootings to the mental health of people pulling the triggers, rather than the weapons they used,”²²⁵ in an article about nineteen year-old Florida school shooter Nikolas Cruz.²²⁶ It illustrates a profound misunderstanding surrounding the risk factors that can erupt into a mass shooting of a type such as Newtown, Connecticut.²²⁷ Though Cruz had not been officially “diagnosed” with a mental illness, he had recently lost his mother and was displaying signs of severe depression.²²⁸ With that said, the *Times* acknowledged that mental illness and access to firearms are huge factors in completed suicides and agreed that the mission of the government should be to do everything in its power to prevent the next tragedy.²²⁹

The Sandy Hook Commission reported that “Although he clearly suffered from profound mental, emotional and developmental challenges, nothing in the records addressed by the Child Advocate’s report establishes a causal role for mental illness in [Adam Lanza’s] crimes.”²³⁰ Experts appointed to the Commission also found a lack of

²²³ *Id.*

²²⁴ Jonathan M. Metzler & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 242 (2015).

²²⁵ Benjamin Muller, *Limiting Access to Guns for Mentally Ill Is Complicated*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/us/gun-access-mentally-ill.html> [<https://perma.cc/TMK6-Z97K>].

²²⁶ *See id.*

²²⁷ *See id.*

²²⁸ *See id.*

²²⁹ *See id.*

²³⁰ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 81.

evidence to support the assertion that Lanza would have clinically qualified for a “psychotic illness,” though they did acknowledge that he appeared “to suffer from severe anxiety with obsessive-compulsive features and possibly from Obsessive-Compulsive Disorder, as well as from depression.”²³¹ Lanza had also been diagnosed with an autism spectrum disorder due to “difficulties with communication, sensory sensitivities and rigidity that emerged at a very early age, and he received the post-mortem diagnosis of anorexia.”²³² With all of this information, the Commission cautioned that “mental health must be conceived more broadly to embrace social, emotional and behavioral health and wellness.”²³³ Statements and information gathered after the shooting point to a strong inference that the “life and the lives of those close to him, particularly his mother’s, were increasingly characterized by a lack of well-being.”²³⁴

The overall consensus of the Sandy Hook Commission is that mental illness alone is not a good predictor of violence and that the stigma that is created by mass shooters’ depiction as “mentally ill” creates other problems for those afflicted in the community.²³⁵ Mental health patients, mental health providers, government officials, academics, and members of law enforcement provided testimony that illustrated how stigma can frustrate the effective treatment and recovery of individuals with mental illness.²³⁶ They also detailed how members of the public still perceive mental illness as “shameful and frightening” and consider people with behavioral health difficulties as “different and dangerous.”²³⁷ In a 2003 report of the President’s New Freedom Commission on Mental Health, many Americans were found to regard “people with mental illness as dangerous, incompetent and at fault for their condition.”²³⁸ Perhaps as a result of such attitudes, the

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 82.

²³⁴ *Id.* “According to the World Health Organization, mental health is defined as ‘a state of well-being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to her or his community.’” *Id.*

²³⁵ *Id.* at 130.

²³⁶ *Id.* at 130–49.

²³⁷ *Id.* at 130.

²³⁸ *Id.*

mentally ill themselves will often not seek help, as the fear of a potential loss of friends, employment, or opinions of others can prevent any potential relief from suffering.²³⁹ Jane Hickey, author of *Gun Prohibitions for People with Mental Illness—What Should The Policy Be?*, agrees, saying, “Broad brush prohibitions focusing on the status of the individual instead of their risk adds to the already stigmatizing effects of a mental illness diagnosis. In addition, such actions may discourage those most at risk of committing violent acts from seeking the treatment they need.”²⁴⁰ The gun advocacy magazine *Guns and Ammo* also looked at this issue and stated, “If all mentally ill persons were prohibited from owning guns, many nonviolent individuals would suffer unjust consequences.”²⁴¹ The article also pointed out that many police officers, firefighters, and EMTs suffering from PTSD or other job-related mental ailments could be prejudiced.²⁴²

Of course, any discussion of this topic would be incomplete without some reflection on the significant role the media plays in perpetuating and sensationalizing negative stigmas associated with those stricken with mental illness.²⁴³ As examples, the *New York Daily News* printed a headline stating “Get The Violent Crazies Off Our Streets!” in 1999 and the cover of a British paper, *The Sun*, read “1,200 Killed By Mental Patients,” with the number 1,200 highlighted in blood red in 2013.²⁴⁴ Headlines of this type and other types of media create and reinforce misconceptions that people with psychiatric illnesses are regularly violent and dangerous.²⁴⁵

Shedding light on the humanity of those who live with these afflictions is an effective way to course correct negative stereotypes held by those outside of the mental health field.²⁴⁶ As communities, we need to engage in personal contacts between ourselves and those who

²³⁹ *Id.* at 136.

²⁴⁰ *Id.*

²⁴¹ Guns & Ammo Staff, *Mental Illness and Gun Ownership*, GUNS & AMMO (Mar. 1, 2005) <http://www.gunsandammo.com/politics/mental-illness-and-gun-ownership/#ixzz5StiQUTDL> [<https://perma.cc/JME7-5754>].

²⁴² *Id.*

²⁴³ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 142.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 144.

have suffered from mental illness,²⁴⁷ with the “community” including police officers and firearms licensing officials.

While acknowledging that stigma is a real problem for the mentally ill, the *American Journal of Public Health* also notes that “[C]ertain persons with mental illness undoubtedly commit violent acts” and that “Reports argue that mental illness might even be underdiagnosed in people who commit random school shootings.”²⁴⁸ The Sandy Hook Commission “found that annual homicide rates by individuals with untreated psychosis were approximately *fifteen times higher* than rates for individuals with treated psychotic illnesses,” which further supports the causal connection between untreated psychotic illness and violence.²⁴⁹ A Swedish study “suggests that a diagnosis of schizophrenia or related psychotic disorder *is* associated with an increased risk for violent offenses, suicide and premature mortality.”²⁵⁰ A history of violent criminal behavior, self-harm, and drug use disorders are risk factors, beyond the initial diagnosis, that have been found to enhance the adverse outcomes.²⁵¹ Additionally, the MacArthur Violence Risk Assessment Study shows that, “[W]hile recently discharged psychiatric patients had somewhat elevated rates of violence (11.5% vs. 4.6% in the community) in the first ten weeks after discharge, within this group those who had attended outpatient treatment sessions had considerably lower rates of violence than those who hadn’t,” illustrating that treatment of an illness can have an effect on one’s propensity for violence.²⁵²

D. The Mentally Ill, Suicide and Access to Firearms

Though societal fear is focused on the risk of mass murder, research shows that a more common tragedy is that those with mental illness and access to firearms are much more likely to kill themselves than anyone else.²⁵³ The Sandy Hook Commission found that “For gun violence in particular, mental illness contributes greatly to rates of

²⁴⁷ *Id.*

²⁴⁸ Metzl & MacLeish, *supra* note 224, at 242.

²⁴⁹ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 175.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 177.

²⁵³ *Id.* at 178.

suicide but marginally to homicide rates.”²⁵⁴ Jane Hickey found that “[O]nly certain serious psychiatric illnesses, such as bipolar disorder and schizophrenia, are associated with a risk of violence to others,” but that “major depressive disorder [can result in] a risk of violence to self, or suicide.”²⁵⁵ It is essential to note that this is true both for these victims and for this behavior that leads to self-harm.²⁵⁶ To illustrate, “[W]omen with mental illness face a five-fold greater likelihood of [being victims of] domestic violence than do women without a psychiatric disorder”; and “Suicide, the leading type of firearm-related death, is highly correlated with mental disorder.”²⁵⁷ “[S]tudies estimate that up to 90-95% of completed suicides are attributable to depression and other psychiatric illnesses, [and are] often in combination with substance abuse.”²⁵⁸ Additionally, more than half of completed suicides involve a firearm, this is true in America where significantly more gun-related deaths are suicides because the use of a gun makes it far more likely that a suicide attempt will be successful and result in the person’s death.²⁵⁹ As noted above, even mass shootings usually end with the shooter’s suicide.²⁶⁰

E. The Deadly Combination of Mental Illness and Substance Abuse Leading to Increased Violence

As previously detailed, persons should not generally be considered more prone to violence than the overall population simply because they are psychologically challenged. However, there are exceptions including “individuals with psychotic/delusional disorders who are currently abusing drugs or alcohol; and young men in their first episode of untreated psychosis, particularly those with persecutory delusions and unregulated anger.”²⁶¹ The Sandy Hook Commission found “that substance abuse has a stronger association with acts of violence than a psychiatric diagnosis. Substance abuse also combines

²⁵⁴ *Id.* at 194.

²⁵⁵ Hickey, *supra* note 30, at 2.

²⁵⁶ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 178.

²⁵⁷ *Id.*(emphasis omitted).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 170.

with mental illness to increase the risk of violence significantly.”²⁶² It is plain that “Alcohol and drug abuse are highly salient risk factors for violence, and when a person with a psychiatric condition has a simultaneous substance abuse problem, the risk of violence escalates.”²⁶³ If a person suffering from a mental disorder has not received treatment, they are likely to experience substance abuse problems, which leads to an increased risk of violence.²⁶⁴ Both the mental illness and the violence must be addressed together in order to effectively combat the problems that arise from their co-occurrence.²⁶⁵ As an example, Jane Hickey recommends that new prohibitions on firearms “should apply to individuals with mental illness who are convicted of violent misdemeanors, abuse alcohol or drugs, are respondents under domestic violence restraining orders, or have engaged in other specific conduct demonstrating an increased risk of violent behavior in the near future.”²⁶⁶

F. Foreseeability/Suitability in Massachusetts Firearms Licensing

After the Cruz shooting in Florida, Attorney General Sessions, while speaking to a group of Sheriffs in Washington said, “It cannot be denied that something dangerous and unhealthy is happening in our country, [in] every one of these cases, we’ve had advance indications and perhaps we haven’t been effective enough in intervening.”²⁶⁷ The Attorney General spoke in an attempt to prevent the next tragedy before it happens and to clarify that each tragedy, in many ways, was foreseeable had law enforcement sought out warning signs.²⁶⁸

Foreseeability is not a new concept in law.²⁶⁹ In 1928, the New York Court of Appeals settled the seminal case of foreseeability in civil negligence cases holding, “[N]egligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of

²⁶² *Id.* at 172.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 172–73.

²⁶⁶ Hickey, *supra* note 30, at 11.

²⁶⁷ Muller, *supra* note 225.

²⁶⁸ *See id.*

²⁶⁹ *See generally* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

damage.”²⁷⁰ In short, the court determined that one is responsible for negligence only if the harm caused is foreseeable at the time of the action or inaction.²⁷¹ Determining foreseeability is at the heart of every “goal” of proper firearms licensing regulation.²⁷²

William Vizzard argues that effective policy formulation must have “useful and attainable goals” due to the fact that advocates have often pursued regulation for regulation’s sake.²⁷³ He further details three goals having these useful and attainable characteristics, each falling under the umbrella of foreseeability: “(1) [r]educe gun possession and carrying by high-risk individuals, (2) [r]educe access to firearms by prohibited persons, [and] (3) [u]tilize firearms laws to incapacitate violent, career offenders.”²⁷⁴ In fact, Vizzard’s entire rationale for these recommendations comes out of a foreseeability and prevention theory. He states, “Access to firearms facilitates robbery, serious assault, and homicide” and that “Reducing the immediate availability of a firearm by making acquisition more difficult and possession more risky directly attacks that capability.”²⁷⁵

New York passed its own ordinance in response to mass shootings called the SAFE Act in an effort to prevent dangerous mentally ill persons from obtaining or retaining guns.²⁷⁶ The SAFE Act imposes reporting obligations on mental healthcare professionals, requiring them in using “reasonable professional judgment,” to report the names of patients “likely to engage in conduct that would result in serious harm to self or others” to help deal with foreseeable risks of violence.²⁷⁷ The SAFE Act defines “mental health professionals” as including “physicians, psychologists, registered nurses and licensed clinical social workers, whether or not they specialize in diagnosing or treating mental illness.”²⁷⁸

²⁷⁰ *Id.* at 344.

²⁷¹ *Id.*

²⁷² *See generally* Vizzard, *supra* note 178, at 893.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 894.

²⁷⁶ James B. Jacobs & Zoe Fuhr, *Preventing Dangerous Mentally Ill Individuals from Obtaining and Retaining Guns: New York’s Safe Act*, 14 GEO. J.L. & PUB. POL’Y 77, 79 (2016); N.Y. PENAL LAW § 265.00.

²⁷⁷ Jacobs & Fuhr, *supra* note 276, at 79-80.

²⁷⁸ *Id.* at 80.

At the federal level, the Center for Disease Control (“CDC”) classifies mass shootings or school violence as a public health issue while stating, “[T]he goal is to stop school violence from happening in the first place.”²⁷⁹ The CDC reports the use of a four-step approach to address public health problems like school violence: (1) defining the problem; (2) identifying risk and protective factors, so that “we can then develop programs to reduce or get rid of [foreseeable] risk factors and to increase protective factors”; (3) develop and test prevention strategies; and (4) ensure widespread adoption by sharing the best prevention strategies.²⁸⁰

Following a similar approach, both the Federal Bureau of Investigation and the Secret Service recommend that schools use a threat assessment approach, focusing on students’ personal behaviors and determining if those behaviors suggest the person poses a threat.²⁸¹ Threat assessments provide an approach where “the [foreseeable] likelihood of a threat being carried out is assessed, and [once assessed,] the likely is sorted from the unlikely.”²⁸²

Even *Guns and Ammo* recommends a foreseeability approach by reporting that “potentially dangerous mentally ill persons must be prevented from purchasing firearms.”²⁸³ The firearms advocates also insightfully find that the “responsibility falls largely upon relatives, friends and medical personnel,” recommending “effective teamwork among these caregivers if there is to be any chance of keeping deeply troubled individuals away from firearms.”²⁸⁴ They also recognize that this responsibility is a “hazardous duty” because “[w]hen severely disturbed individuals commit violent acts, 85 percent of victims are family members or friends.”²⁸⁵

In response to this, many states, including Massachusetts, have instituted so called “red flag” laws allowing family members or law enforcement to petition the court for a “temporary gun restraining order” which allows the police to seize firearms from a potentially

²⁷⁹ UNDERSTANDING SCHOOL VIOLENCE: FACT SHEET, *supra* note 69.

²⁸⁰ *Id.*

²⁸¹ Demitchell, *supra* note 76, at 294.

²⁸² *Id.*

²⁸³ Guns & Ammo Staff, *supra* note 241.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

dangerous license holder.²⁸⁶ When reporting on such laws, the *New York Times* wrote in terms illustrating that foreseeability of danger was an absolute key.²⁸⁷ From 1999 to June of 2013, 762 gun seizure cases were filed in the state of Connecticut. Duke University research then “estimated that the law had averted approximately one suicide for every 10 to 11 gun seizure cases.”²⁸⁸ The Massachusetts red flag law requires the petitioner to show “by a preponderance of the evidence that the respondent poses a risk of causing bodily injury to self or others by having in the respondent’s control, ownership or possession a firearm.”²⁸⁹ The question is, if these measures can be put in place after licensure, then why can they not be put in place as a requirement for licensure?

In Massachusetts, the concept of foreseeability is woven throughout the firearms licensing law and its requirements.²⁹⁰ The purpose behind requiring a license to carry or possess a firearm is that “prevention of harm is often preferable to meting out punishment after an unfortunate event.”²⁹¹ The statute is “intended to have local licensing authorities employ every conceivable means of preventing deadly weapons in the form of firearms from coming into the hands of evildoers,” further describing those persons as being immature, having anti-social behavior, or a status as an alien.²⁹²

As stated in *Ruggiero v. Police Commissioner of Boston*, the stated goal of firearms control legislation in the Commonwealth of Massachusetts is “to limit access to deadly weapons by irresponsible persons.”²⁹³ In an effort to meet this goal, Massachusetts requires licenses for the sale or possession of firearms and ammunition.²⁹⁴ The *Ruggiero* court further detailed that, “[P]revention of harm is often

²⁸⁶ Muller, *supra* note 225.

²⁸⁷ *See generally id.*

²⁸⁸ *Id.*

²⁸⁹ MASS. GEN. LAWS ch. 140, § 131S (2018).

²⁹⁰ *See* MARC G. PERLIN & DAVALENE COOPER, *Requirement of License to Carry or Possess—Purpose of Statute*, in 2 MASSACHUSETTS PROOF OF CASES CRIMINAL § 49:12 (2018-2019 ed.); *see also* MASS. GEN. LAWS ch. 140, § 131L(c) (2018).

²⁹¹ PERLIN & COOPER, *supra* note 290, at § 49:12.

²⁹² *Id.*

²⁹³ *Ruggiero v. Police Comm’r of Bos.*, 464 N.E.2d 104, 106 (Mass. App. Ct. 1984).

²⁹⁴ *Id.*

preferable to meting out punishment after an unfortunate event” and that Massachusetts General Laws chapter 140, section 131 “was enacted as a first-line measure in the regulatory scheme.”²⁹⁵ When Massachusetts’ firearms law was first challenged, the *Davis* court said that “[T]he statute at bar is part of a large regulatory scheme to promote the public safety.”²⁹⁶ Broad discretion is given to municipalities when it comes to a licensing authority’s ability to limit access to firearms as a preventive measure to mitigate violent crime.²⁹⁷ These limitations can include limiting a license to a specific purpose.²⁹⁸ In *Ruggiero*, the Appeals Court interpreted the licensing statute as allowing licensing officials to place enforceable restrictions on an issued license, further gaining precedential value when the SJC declined to review the decision further.²⁹⁹ In fact, Massachusetts specifically uses the concept of foreseeability when it comes to the crime of improper storage of a firearm stating:

*A violation of this section shall be punished, in the case of a rifle or shotgun that is not a large capacity weapon and the weapon was stored or kept in a place where a person younger than 18 years of age who does not possess a valid firearm identification card issued under section 129B may have access without committing an unforeseeable trespass, by a fine of not less than \$2,500 nor more than \$15,000 or by imprisonment for not less than 1 1/2 years nor more than 12 years or by both such fine and imprisonment.*³⁰⁰

As part of the Massachusetts regulatory scheme, and at the heart of the concept of preventing foreseeable dangers, “A permit to carry firearms may be issued to a ‘suitable person’ who has good reason to fear injury to his person or property, or for any other proper reason.”³⁰¹ As detailed, the licensing authority is required to conduct a two-step inquiry to determine an applicant’s eligibility, (1) looking at the

²⁹⁵ *Id.*

²⁹⁶ Commonwealth v. Davis, 343 N.E.2d 847, 849 (Mass. 1976).

²⁹⁷ Driscoll, *supra* note 26, at 106.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ MASS. GEN. LAWS ch. 140, § 131L(c) (2018).

³⁰¹ RANDALL & FRANKLIN, *supra* note 29, at § 16.10.

applicant's personal suitability for gun ownership and (2) considering whether the applicant has a "proper purpose" for carrying a firearm.³⁰² As licensing authorities, police chiefs have broad discretion and considerable latitude in making the decisions to issue a license to carry a firearm.³⁰³ Though the statute has been amended over the years, the "suitable person" standard still confers this discretion upon the licensing authority.³⁰⁴

States may infringe on a citizen's Second Amendment right to carry firearms outside of the home, by showing that a law is rational to achieving an end.³⁰⁵ The suitability standard has been challenged multiple times in Massachusetts courts, but each time, it has been upheld so long as a licensing authority's decision was not "arbitrary or capricious."³⁰⁶ The reasoning that originated in *Davis* has made it possible for the majority of challenges to the Massachusetts regulatory scheme to be decided quickly and decisively.³⁰⁷ With that said, some speculated that Massachusetts would have to deviate significantly from this thinking with the decisions handed down by the *Heller* and *McDonald* courts, but this has yet to be the case.³⁰⁸ The suitability standard was upheld by the SJC as recently as 2015 when it decided *Chief of Police of City of Worcester v. Holden*.³⁰⁹ Holden's license was revoked on suitability grounds based on information that he had beaten his wife, and it was ruled that he could not challenge on due-process vagueness grounds; the statute that governs the "suitable person" standard.³¹⁰ "The Massachusetts Supreme Judicial Court found the state law passed the rational basis test and therefore was Constitutionally sound."³¹¹ The SJC also found that "the

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Michael F. Grimes, *Constitutional Law—The Second Amendment with A Rational Bite: Looking for a Heightened Standard of Review—Chief of Police of City of Worcester v. Holden*, 26 N.E.3d 715 (Mass. 2015), 21 SUFFOLK J. TRIAL & APP. ADVOC. 209, 214 (2016).

³⁰⁵ *Id.* at 215.

³⁰⁶ *Id.* at 210.

³⁰⁷ Driscoll, *supra* note 26, at 108.

³⁰⁸ *Id.* at 109.

³⁰⁹ *Chief of Police of Worcester v. Holden*, 26 N.E.3d 715, 719 (Mass. 2015).

³¹⁰ *Id.* at 719, 724-28.

³¹¹ Grimes, *supra* note 304, at 209; *Holden*, 26 N.E.3d at 722-28.

Massachusetts law did not violate the Second Amendment by overly burdening it, but it was a reasonable and rational means to reach the desired goal of preventing dangerous weapons from entering the hands of unsuitable persons.”³¹² Even more surprisingly, the *Holden* court found that it did not violate procedural due process to place the burden of proof on the license holder to show suitability for a license because the license holder was in the best position to present relevant evidence as to the suitability requirement.³¹³ In addition to past behavior, the suitability standard was also upheld in *MacNutt v. Police Commissioner of Boston*, where a licensor required an applicant to complete a test assessing an applicant’s skill handling firearms as a condition to reissuance of his firearms license.³¹⁴

Because the main purpose of the Massachusetts licensing scheme is the prevention of foreseeably dangerous persons from gaining access to firearms, available evidence overwhelmingly concludes that prohibited persons acquire guns most often from their home, acquaintances, or the secondary market.³¹⁵ As noted, Adam Lanza obtained his tools of destruction from his lawfully licensed mother, who left her weapons unsecured and unattended, which cost her and twenty-six others their lives.³¹⁶ William Vizzard recommends that “Policy should focus on [the] increasing risk for transfer of firearms to prohibited persons, stemming the flow of new firearms from the primary or legal market to the secondary or unlicensed market.”³¹⁷ In this vein, it is recommended that Massachusetts expand the questions on the firearms licensing application as follows: (1) Has any current full-time household member ever been committed to any hospital or institution for mental illness, or alcohol or substance abuse? and (2) If the answer to (1) is yes, what safety measures have been taken in the home to ensure that lawfully owned firearms do not end up in the possession of said person?³¹⁸

Affirmative answers will not lead to an outright prohibition from licensure. In an effort to maintain the constitutionality of the regulation

³¹² Grimes, *supra* note 304, at 215.

³¹³ *Holden*, 26 N.E.3d at 730.

³¹⁴ *MacNutt v. Police Comm’r of Bos.*, 572 N.E.2d 577, 578 (Mass. App. Ct. 1991).

³¹⁵ Vizzard, *supra* note 178, at 894.

³¹⁶ SANDY HOOK ADVISORY COMMISSION, *supra* note 1, at 10.

³¹⁷ Vizzard, *supra* note 178, at 894.

³¹⁸ *See id.* at 894–95.

this will be used as one of many factors in determining the overall suitability of the licensee.³¹⁹ Local licensing authorities may use this information as a factor in determining suitability for reasons of approval or denial of the license.³²⁰ If a potential licensee is denied, the reasons must be clearly stated, the license holder must be given an opportunity to correct any identified deficiencies, and decisions may not be arbitrary or capricious.³²¹ License holders should also be required to demonstrate said safety features in Question Two on site for a licensing official upon request.³²² Passage of these measures would meet the goals of the Massachusetts firearms regulatory scheme³²³ and be more likely to gain the approval of the Democratically controlled legislature in Massachusetts.³²⁴

IV. CONCLUSION

The tragedies of mass shootings and suicides committed by those with mental or emotional afflictions have become an all too common occurrence in twenty-first century America. What is even more tragic, however, is that many of these awful events were preceded by some sort of warning sign. Though those struggling with mental illness may not be per se violent, using the tenets of foreseeability, one can see that people in crisis should not have access to instruments of destruction and death. This is not only to protect the public at large but to also protect those suffering from mental illness from themselves.

The story of Nancy and Adam Lanza illustrate what can happen when an emotional crossroads is met with the ready availability of high powered weapons. Nancy Lanza did not respect the power that she made available to her son, and as a result, twenty-six people, including herself and twenty children lost their lives. The recommendations within this Article serve as a starting place to give licensing authorities in Massachusetts more information from which to

³¹⁹ See generally Chief of Police of Worcester v. Holden, 26 N.E.3d 715 (Mass. 2015).

³²⁰ See generally MASS. GEN. LAWS ch. 140, § 131 (2018).

³²¹ *Id.*

³²² See MacNutt v. Police Comm'r of Bos., 572 N.E.2d 577, 578 (Mass. App. Ct. 1991).

³²³ See Ruggiero v. Police Comm'r of Bos., 464 N.E.2d 104, 106 (Mass. App. Ct. 1984).

³²⁴ See generally Mata, *supra* note 47, at 201.

make licensing decisions and to provide information to licensees that would strengthen the licensure requirements. The concepts of foreseeability and harm reduction both require the removal of access to firearms from those who could become emotionally unstable due to mental illness or substance abuse.