

# “A Profoundly Masculine Act”: Mass Shootings, Violence Against Women, and the Amendment That Could Forge a Path Forward

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*There is a disturbing connection between mass shootings and violence against women. This connection is one which the Lautenberg Amendment to the Gun Control Act, which prohibits any person convicted of a misdemeanor crime of domestic violence from possessing guns, seeks to disrupt. This Note argues that the Lautenberg Amendment, while an invaluable tool in the fight against mass shootings, does not go far enough. Gender-based crimes other than domestic violence, specifically stalking and sexual assault, are also indicative of a potential for future mass violence. Thus, the Lautenberg Amendment should be expanded to apply to those convicted of misdemeanor crimes of stalking and sexual assault. Part I presents an overview of studies conducted on mass shootings and domestic violence, as well as case studies of instances in which mass shootings, stalking, and sexual assault converged. Part II examines the connection between mass shootings and violence against women by employing a hegemonic masculinity perspective. Part III makes the case for expanding the Lautenberg Amendment to apply to those convicted of misdemeanor crimes of stalking and sexual assault. Part IV looks to initiatives launched in Mexico and the United States as examples of how non-legal actors could go about targeting a root cause of mass shootings: the narrow and dangerous conception of what it is to “be a man” in the United States.*

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DOI: <https://doi.org/10.15779/Z382V2C98F>

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Introduction .....	674
I. The Connection Between Mass Shootings and Violence Against Women .....	678
A. Statistics and Examples .....	678
B. Case Studies.....	681
1. Mass Shootings Carried Out by Adults .....	682
2. Mass Shootings Carried Out by Students .....	685
II. Understanding the Connection Between Mass Shootings and Violence Against Women: A Hegemonic Masculinity Perspective .....	687
III. Expanding the Lautenberg Amendment to Apply to Individuals Convicted of Misdemeanor Stalking and Sexual Assault.....	690
A. Background.....	690
1. The Gun Control Act of 1968 .....	690
2. Amending the Gun Control Act.....	691
3. The Lautenberg Amendment .....	692
a. Legislative History.....	692
b. Content.....	692
B. Expanding the Lautenberg Amendment .....	693
1. Individuals Convicted of Misdemeanor Stalking .....	693
a. Background.....	693
b. Definition .....	694
c. Classification .....	694
d. Expanding the Lautenberg Amendment.....	695
2. Individuals Convicted of Misdemeanor Sexual Assault .....	697
a. Background.....	697
b. Definition and Classification .....	698
c. Expanding the Lautenberg Amendment.....	698
IV. Disrupting the Link Between Masculinity and Violence.....	701
Conclusion .....	704

## INTRODUCTION

In 2012, Devin P. Kelley was charged with assault while stationed at Holloman Air Force Base in New Mexico.<sup>1</sup> According to Air Force records, Mr. Kelley had repeatedly struck, kicked, and choked his first wife, Tessa Brennaman, and hit his stepson's head with what was described as "a force likely to produce death or grievous bodily harm."<sup>2</sup> "He assaulted his stepson severely

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1. Alan Blinder, Dave Phillips & Richard A. Oppel Jr., *In 2012 Assault, Texas Gunman Broke Skull of Infant Stepson*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/us/devin-patrick-kelley-texas.html?action=click&contentCollection=U.S.&module=RelatedCoverage&region=EndOfArticle&pgtype=article> [https://perma.cc/7SM5-ZW3E].

2. *Id.*

enough that he fractured his skull,” said a retired colonel who was the chief prosecutor for the Air Force.<sup>3</sup> Five years later, Ms. Brennaman would describe their marriage as one filled with abuse, stating that Mr. Kelley once threatened her over a speeding ticket.<sup>4</sup> Recounting that incident, Ms. Brennaman said: “[H]e had a gun in his holster right here and he took that gun out, and he put it to my temple and he told me, ‘Do you want to die? Do you want to die?’”<sup>5</sup> Mr. Kelley ultimately entered a pretrial agreement, where he pleaded guilty.<sup>6</sup> In the years following his court-martial, Mr. Kelley bought two guns in Colorado, and two others in San Antonio.<sup>7</sup> The sales made in San Antonio were approved by the National Instant Criminal Background Check System.<sup>8</sup>

On November 5, 2017, Mr. Kelley entered a church in Sutherland Springs, Texas and killed twenty-five people with a rifle.<sup>9</sup> One day later, the Air Force admitted that it had failed to enter Mr. Kelley’s domestic violence court-martial into the National Criminal Information Center database.<sup>10</sup> Had this information been entered into the database, Mr. Kelley would have been blocked from buying the weapon he used in the massacre under the one piece of federal legislation that acknowledges the connection between mass shootings and violence against women: the Lautenberg Amendment to the Gun Control Act.

The Lautenberg Amendment prohibits any person convicted of a misdemeanor crime of domestic violence from shipping, transporting, possessing, or receiving guns via interstate commerce.<sup>11</sup> Since it was enacted, nearly 195,000 people have been stopped from buying weapons.<sup>12</sup> The Lautenberg Amendment is an invaluable tool in the fight against mass shootings because it rightfully treats crimes of domestic violence as red flags for larger-scale acts of violence. I will argue, however, that the Lautenberg Amendment does not go far enough. This is because gender-based crimes other than domestic

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3. *Id.*

4. *Texas Gunman Devin Kelley’s Ex-wife Says He “Had a Lot of Demons,”* CBS NEWS (Nov. 10, 2017, 7:00 PM), <https://www.cbsnews.com/news/tessa-brennaman-devin-kelley-sutherland-springs/> [<https://perma.cc/DRD6-EZ3Q>].

5. *Id.*

6. Sheryl Gay Stolberg, *Domestic Abusers Are Barred From Gun Ownership, but Often Escape the Law*, N.Y. TIMES (Nov. 6, 2017), [https://www.nytimes.com/2017/11/06/us/politics/domestic-abuse-guns-texas-air-force.html?\\_r=0](https://www.nytimes.com/2017/11/06/us/politics/domestic-abuse-guns-texas-air-force.html?_r=0) [<https://perma.cc/8VSD-62UT>].

7. David Montgomery, Richard A. Oppel Jr. & Jose A. Del Real, *Air Force Error Allowed Texas Gunman to Buy Weapons*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/us/texas-shooting-church.html> [<https://perma.cc/KMQ5-FB2H>].

8. *Id.*

9. Richard A. Oppel Jr., *Air Force Failed to Report Dozens of Service Members to Gun Database*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/us/air-force-devin-kelley-gunman-texas.html> [<https://perma.cc/37SU-MX6C>].

10. Stolberg, *supra* note 6.

11. 18 U.S.C. § 922(g)(9).

12. The Editorial Bd., *There Is Common Ground on Guns*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/opinion/domestic-violence-guns.html> [<https://perma.cc/4MT9-T99X>].

violence, specifically stalking and sexual assault,<sup>13</sup> are also indicative of a potential for future mass violence. Thus, the Lautenberg Amendment should be expanded to apply to those convicted of misdemeanor crimes of stalking and sexual assault.

Part I presents an overview of studies on mass shootings and domestic violence. As there has been no formal research into the connection between mass shootings, stalking, and sexual assault, I present case studies of instances in which these phenomena converged. All eight perpetrators of the mass shootings I examine, including Mr. Kelley, had a history not just of domestic violence, but also of stalking, rape, or harassment. Part II examines the connection between mass shootings and violence against women by employing a hegemonic masculinity perspective. I discuss the findings of several scholars who have examined the perceived affronts (“stressors”) that trigger mass murder. All these scholars found some link between the stressors and a hegemonic construction of the perpetrators’ masculine identities: one characterized by power, authority, and physical strength, as well as competitiveness, self-reliance, and stoicism. These scholars’ findings demonstrate that perpetrators of mass murder see violence as a justified response not only to women who affront them, but also to members of a society they perceive as emasculating them. Part III makes the case for expanding the Lautenberg Amendment to apply to those convicted of the misdemeanor crimes of stalking and sexual assault. While expanding the Lautenberg Amendment in this way would constitute an important step in the fight against mass shootings, legislators are not the only actors with a role to play. Non-legal actors, such as parents and educators, are uniquely situated to target a root cause of mass shootings: the narrow and dangerous conception of what it is to “be a man” in the United States. An in-depth exploration of this issue is beyond the scope of this Note, but in its place, Part IV briefly looks to initiatives launched in Mexico and the United States as examples of how non-legal actors could begin disrupting the link between masculinity and violence.

In the era of #MeToo and a national reckoning with violence against women, several principles guiding the discussion that follows must be established. First, one might argue that instead of expanding the Lautenberg Amendment, state legislators should amend state laws to classify stalking and sexual assault as felonies rather than misdemeanors. The Gun Control Act creates classes of individuals who are disqualified from buying or owning guns, including those convicted of felonies. Were state legislators to reclassify these offenses, the argument goes, perpetrators of stalking and sexual assault would be prevented from possessing guns, and the harm caused by their actions would be more fully redressed by harsher sentences.

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13. In this Note, the term “sexual assault” refers to a sex crime that is often classified as a misdemeanor: non-consensual penetration committed without the use of force.

This Note sides with opponents of “carceral feminism” in assuming from the outset that imposing harsher sentences on perpetrators of gender-based crimes is not a solution to violence against women. Carceral feminism, a phrase coined by Professor Elizabeth Bernstein, refers to a reliance on policing, prosecution, and imprisonment to resolve gender-based violence.<sup>14</sup> In her article, “The Sexual Politics of the ‘New Abolitionism,’” Professor Bernstein describes carceral feminism as “a drift . . . to the carceral state as the enforcement apparatus for feminist goals.”<sup>15</sup> This “drift” stands in “stark” and “ironic” contrast to feminist activism against the prison-industrial complex.<sup>16</sup> Further, relying on strategies of incarceration as a “chief tool of justice” ensures that disproportionate numbers of poor people and people of color will find themselves in the prison system for longer periods of time.<sup>17</sup>

This Note argues that we can do better. Expanding the Lautenberg Amendment to apply to individuals convicted of misdemeanor crimes of stalking and sexual assault is not a perfect solution. Such an act would expand the pool of collateral consequences that follow certain convictions. A burgeoning number of scholars and advocates rightfully lament these consequences, which include ineligibility for public benefits, public housing, student loans, and employment opportunities, as well as civic exclusions such as ineligibility for jury service and disenfranchisement. These consequences hinder re-entry, exacerbate the risks of recidivism, and have a disproportionate impact on individuals and communities of color.<sup>18</sup> However, a prohibition on gun ownership or possession for individuals with certain convictions would not have the same pernicious impact as do collateral consequences which limit social, economic, and political access. Thus, the benefits flowing from such a policy would outweigh its potential harms.

Further, this Note strives to avoid caricaturing perpetrators of mass shootings as “crazed killers” and seeks to understand their actions in the context of the society that produced them. Every time the United States experiences a mass shooting, the link between mass murder and masculinity, as well as that between mass murder and race, go unnoticed. Instead, commentators turn their attention to the need to reform our mental health care system. Accompanying this shift in conversation are descriptions of the perpetrator as a socially isolated and psychotic “madman.”<sup>19</sup> This Note argues that the “crazed killer explanation”

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14. Alex Press, *#MeToo Must Avoid “Carceral Feminism,”* VOX (Feb. 1, 2018), <https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism> [<https://perma.cc/8Q87-TARY>].

15. Elizabeth Bernstein, *The Sexual Politics of the “New Abolitionism,”* 18 DIFFERENCES 128, 143 (2007).

16. *Id.*

17. *Id.*

18. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459–64 (2010).

19. For example, in a tweet following the Parkland, Florida school shooting, President Trump described the perpetrator as a “savage sicko.” Donald J. Trump (@realDonaldTrump), TWITTER (Feb.

for mass shootings is a smokescreen. Describing perpetrators of mass shootings as “sickos” and “monsters” is not only dehumanizing and ableist, but draws attention away from the society in which these men came to endorse mass violence as a response to gendered setbacks. This is not to deny that mental illness plays a role in mass murder, but rather to shed light on how mental illness operates in tandem with other factors. As Michael Kimmel puts it, “[white and male mass murderers] . . . want to destroy the entire world in some cataclysmic, video-game, and action movie-inspired apocalypse . . . Yes, of course, this is mental illness speaking; but it is mental illness speaking with a voice that has a race and a gender.”<sup>20</sup> That voice, and the society which gives rise to it, is the focus of this Note.

## I.

### THE CONNECTION BETWEEN MASS SHOOTINGS AND VIOLENCE AGAINST WOMEN

#### A. *Statistics and Examples*

In the aftermaths of mass shootings in the United States, researchers are often unsure how to create profiles of the perpetrators.<sup>21</sup> Many of the variables that appear to be linked to risk factors for such acts of violence do not necessarily hold up to scientific scrutiny.<sup>22</sup> Based on the findings of recent studies, however, a disturbing pattern has emerged. There is an overlooked link between mass shootings and domestic violence.

Everytown for Gun Safety, a national gun violence prevention organization, defines a mass shooting as an incident in which four or more people, not including the shooter, are killed with a gun.<sup>23</sup> Using Federal Bureau of Intelligence (FBI) data and media reports, the organization conducted a comprehensive analysis of every mass shooting that took place in the United States between January 2009 and December 2016.<sup>24</sup> The analysis found that there have been 156 mass shootings in the nearly eight-year period.<sup>25</sup> In at least

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22, 2018), <https://twitter.com/realDonaldTrump/status/966653833047887874> [https://perma.cc/AZ8V-UADE] Similarly, National Rifle Association spokeswoman Dana Loesch described the gunman as “an insane monster.” Jen Christensen, *Trump’s Language on School Shooter’s Mental Health Could be Harmful, Experts Say*, CNN (Feb. 22, 2018), <https://www.cnn.com/2018/02/22/health/trump-mental-illness-comments-bn/index.html> [https://perma.cc/2985-RSB7]

20. Soraya Chemaly, *Mass Killings in the US: Masculinity, Masculinity, Masculinity*, HUFFINGTON POST, [http://www.huffingtonpost.com/soraya-chemaly/mass-killings-in-the-us-w\\_b\\_8234322.html](http://www.huffingtonpost.com/soraya-chemaly/mass-killings-in-the-us-w_b_8234322.html) (Oct. 5, 2016) [https://perma.cc/947W-XXWA].

21. Azadeh Aalai, *Profile of a Mass Shooter: The Domestic Violence Link*, PSYCHOL. TODAY: THE FIRST IMPRESSION (May 7, 2016), <https://www.psychologytoday.com/blog/the-first-impression/201605/profile-mass-shooter-the-domestic-violence-link> [https://perma.cc/BUK2-DEPZ].

22. *Id.*

23. *Mass Shootings in the United States: 2009–2016*, EVERYTOWN FOR GUN SAFETY (Apr. 11, 2017), <https://everytownresearch.org/reports/mass-shootings-analysis> [https://perma.cc/6SFH-8E77].

24. *Id.*

25. *Id.*

eighty-five of the cases (54 percent), the perpetrator's victims included a current or former intimate partner or other family member.<sup>26</sup> Indeed, soon after the Sutherland Springs shooting, law enforcement officials stated that Mr. Kelley may have been driven by anger toward his second wife and her family members, who sometimes attended the church in which the shooting occurred.<sup>27</sup> "This was not racially motivated. It wasn't over religious beliefs. It was a domestic situation going on," a spokesman for the Texas Department of Public Safety said.<sup>28</sup>

In 2015, the Huffington Post conducted its own analysis of the data compiled by Everytown for Gun Safety. It found that of the 57 percent of mass shootings involving an intimate partner or other family member, 64 percent of the victims were women and children.<sup>29</sup> Even when mass shootings involve neighbors, strangers, and police, women and children overwhelmingly pay the price.

Everytown for Gun Safety's findings are corroborated by a study performed by Mayors Against Illegal Guns. This organization defines a mass shooting as any incident where at least four people are murdered with a gun.<sup>30</sup> By reviewing mass shootings in the FBI's Supplementary Homicide Reports from 2009 and 2010, searching the media for details about those incidents, and performing the same searches on mass shootings that occurred in 2011 and 2012, Mayors Against Illegal Guns conducted a comprehensive analysis of every mass shooting that occurred in the United States between January 2009 and January 2013.<sup>31</sup>

The ensuing report describes forty-three mass shootings and finds a connection between mass shootings and domestic violence.<sup>32</sup> In at least seventeen of the cases (40 percent), the perpetrator killed a current or former intimate partner.<sup>33</sup> At least six of those perpetrators, like Mr. Kelley, had prior domestic violence charges.<sup>34</sup> "We have seen over and over this pattern where in

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26. *Id.*

27. Blinder et al., *supra* note 1.

28. Montgomery et al., *supra* note 7. Similarly, in November 2017, Kevin Janson Neal killed four people and injured ten others in Northern California. The death toll rose to five after authorities found the body of Mr. Neal's wife hidden under the floor of the couple's house. Investigators believe that Mr. Neal's rampage started with her killing. Thomas Fuller, *Northern California Gunman Killed Wife Before Shooting Rampage*, N.Y. TIMES (Nov 15, 2017), <https://www.nytimes.com/2017/11/15/us/northern-california-shooting-wife.html> [<https://perma.cc/9E29-7REQ>].

29. Melanie Jeltsen, *We're Missing The Big Picture on Mass Shootings*, HUFFINGTON POST (Sept. 15, 2015), [http://www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women\\_us\\_55d3806ce4b07addcb44542a](http://www.huffingtonpost.com/entry/mass-shootings-domestic-violence-women_us_55d3806ce4b07addcb44542a). [<https://perma.cc/HW3M-JF92>].

30. MASS SHOOTINGS SINCE JANUARY 20, 2009, MAYORS AGAINST ILLEGAL GUNS 1 (2013), [https://www.washingtonpost.com/blogs/wonkblog/files/2013/02/mass\\_shootings\\_2009-13\\_-\\_jan\\_29\\_12pm1.pdf](https://www.washingtonpost.com/blogs/wonkblog/files/2013/02/mass_shootings_2009-13_-_jan_29_12pm1.pdf) [<https://perma.cc/75R9-U7QE>].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

these notorious mass shootings, it is a very common thread where the person had a particular history of domestic violence,” says Billy Rosen, former deputy legal director for Everytown for Gun Safety.<sup>35</sup> Marsha Robertson, director of communications at Futures Without Violence, says that the history of domestic violence among perpetrators of mass shootings is so common that her organization refers to the pattern as “Day 3.”<sup>36</sup> “On Day 1,” she describes, “the shooting occurs and the press has only the bare bones of the incident. On Day 2, the media has access to much more biographical information. On Day 3, further inquiry has confirmed that the shooter had a history of [committing] domestic violence . . . .”<sup>37</sup>

A brief survey of high-profile mass shootings from the past two years confirms this pattern. In June 2016, Omar Mateen killed forty-nine people and wounded fifty-three others at an Orlando gay club, Pulse.<sup>38</sup> Four days later, Mateen’s first wife, Sitora Yusufiy, told the press that when she was married to him, he regularly abused her. “He would just come home and start beating me up because the laundry wasn’t finished or something like that,” Ms. Yusufiy said.<sup>39</sup> Five months after the shooting, Mateen’s second wife, Noor Salman, gave her first interview to the press.<sup>40</sup> In the interview, Ms. Salman described Mr. Mateen as someone who angered easily and beat her often.<sup>41</sup> About six months into their marriage, while Ms. Salman was pregnant, Mr. Mateen flew into a rage and punched her shoulder so hard that it bruised.<sup>42</sup> He would also pull her hair, choke her, and threaten to kill her.<sup>43</sup>

In January 2017, Esteban Santiago opened fire at a baggage claim in the Fort Lauderdale International Airport, killing five people and wounding eight others.<sup>44</sup> The next day, the Daily Beast reported that Mr. Santiago was being

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35. Stolberg, *supra* note 6.

36. Melissa Jeltsen, *It’s Time To Recognize What Many Mass Murderers Share In Common*, HUFFINGTON POST (July 18, 2016), [https://www.huffingtonpost.com/entry/mass-killers-domestic-violence\\_us\\_578d06ade4b0fa896c3f6837](https://www.huffingtonpost.com/entry/mass-killers-domestic-violence_us_578d06ade4b0fa896c3f6837) [<https://perma.cc/HK7Z-TSW3>].

37. *Id.*

38. Rebecca Traister, *What Mass Killers Really Have in Common*, CUT (July 15, 2016), <http://nymag.com/thecut/2016/07/mass-killers-terrorism-domestic-violence.html> [<https://perma.cc/GLE3-HZGM>].

39. Margaret Talbot, *Terror Begins at Home*, NEW YORKER: DAILY COMMENT (June 16, 2016), <http://www.newyorker.com/news/daily-comment/terror-begins-at-home> [<https://perma.cc/PW5A-FQPC>].

40. See Adam Goldman, *Orlando Gunman’s Wife Breaks Silence: ‘I Was Unaware,’* N.Y. TIMES (Nov. 1, 2016), <http://www.nytimes.com/2016/11/02/us/politics/orlando-shooting-omar-mateen-noor-salman.html> [<https://perma.cc/DY2S-R3DZ>].

41. *Id.*

42. *Id.*

43. *Id.*

44. Brady Zadrozny, *Ft. Lauderdale Gunman Esteban Santiago Was Being Prosecuted for Strangling His Girlfriend*, DAILY BEAST (Jan. 7, 2017), <http://www.thedailybeast.com/articles/2017/01/06/esteban-santiago-id-d-as-airport-gunman-flew-with-gun-in-checked-luggage> [<https://perma.cc/KNX6-QK3R>].



prosecuted for strangling his girlfriend.<sup>45</sup> About one year before the shooting, Mr. Santiago had verbally assaulted his girlfriend through a locked bathroom door, telling her to “get the fuck out, bitch.”<sup>46</sup> He eventually broke down the door, struck her head, and strangled her.<sup>47</sup>

In April 2017, Kori Ali Muhammad killed four people in downtown Fresno.<sup>48</sup> The same day, the Associated Press reported that he had been charged with more than a dozen felonies and misdemeanors between 1997 and 2004, including domestic violence.<sup>49</sup> The list goes on.

Even when intimate partners or family members are not involved in mass shootings, women are still more likely to be victimized. Victims of mass murder tend to differ from other homicide victims. According to a 2012 study, victims of mass murder in the United States are significantly more likely to be female than are other homicide victims (43 percent compared to 23 percent).<sup>50</sup> In 2015, the Huffington Post found that 64 percent of the victims of mass shootings in its study were women and children, though women make up only 15 percent of gun violence homicide victims in the United States, and children only 7 percent.<sup>51</sup> Similarly, women are twice as likely to die in school shootings in the United States than men are.<sup>52</sup>

### B. Case Studies

In order to elucidate the link between mass shootings and violence against women, a closer look at instances in which these phenomena have converged is warranted. All eight perpetrators of the mass shootings I examine, including Mr. Kelley, had a history not just of domestic violence, but of stalking, rape, or harassment.<sup>53</sup> There has been no formal research into the connection between mass shootings, stalking, and sexual assault, so evidence of such a link is anecdotal. Despite its limitations, however, these case studies bring the

45. *Id.*

46. *Id.*

47. *Id.*

48. *The Latest: Fresno Suspect Faces 4 Murder Charges*, ASSOCIATED PRESS (Apr. 18, 2017), [http://hosted2.ap.org/APDEFAULT/386c25518f464186bf7a2ac026580ce7/Article\\_2017-04-18-US--Fresno\\_Fatal\\_Shooting-The\\_Latest/id-6936c5f353914af999730eb0bc6ad9ae](http://hosted2.ap.org/APDEFAULT/386c25518f464186bf7a2ac026580ce7/Article_2017-04-18-US--Fresno_Fatal_Shooting-The_Latest/id-6936c5f353914af999730eb0bc6ad9ae) [https://perma.cc/9G24-QP45].

49. *Id.*

50. Denise Kennedy-Kollar & Christopher A.D. Charles, *Hegemonic Masculinity and Mass Murderers in the United States*, 8 SW. J. CRIM. JUST. 62, 63 (2012).

51. Jeltsen, *supra* note 29.

52. Soraya Chemaly, *In Orlando, as Usual, Domestic Violence Was Ignored Red Flag*, ROLLING STONE (June 13, 2016), <http://www.rollingstone.com/politics/news/in-orlando-as-usual-domestic-violence-was-ignored-red-flag-20160613> [https://perma.cc/AZ98-4UXY].

53. This Note does not argue that the *law* should treat a history of verbally and sexually harassing women as a red flag for a future act of violence. Such non-violent behavior is not (and should not be) criminalized. However, case studies of individuals with such a history who went on to carry out mass shootings have been included due to the light they shed on the larger link between mass shootings and misogyny.

connection between mass shootings and violence against women into sharp relief.

1. *Mass Shootings Carried Out by Adults*

Robert Dear, Kevin Janson Neal, Jarrod W. Ramos, and Micah Johnson were never charged with crimes of domestic violence before they carried out mass shootings. However, all four had a documented history of stalking, rape, or harassment.

In November 2015, Robert Dear, who had a history of stalking, killed three people and wounded nine at a Planned Parenthood facility in Colorado Springs.<sup>54</sup> In 1992, Mr. Dear was arrested for the rape of a woman who worked at a mall in North Charleston.<sup>55</sup> According to police records, Mr. Dear had repeatedly asked the woman for a date.<sup>56</sup> Although she refused, he kept calling her two to three times a day.<sup>57</sup> Mr. Dear then allegedly appeared at the woman's front door and raped her at knifepoint.<sup>58</sup> In a 1993 divorce affidavit, Mr. Dear's second wife described him as extremely abusive.<sup>59</sup> She claimed that he once "threw her around a room by her hair" and "beat her head against the ground."<sup>60</sup> He would "erup[t] into fury in a matter of seconds," she said, and she "lived in fear and dread of his emotional and physical abuse."<sup>61</sup> In 1997, police responded to a domestic violence call from Mr. Dear's third wife.<sup>62</sup> She told police that he had taken her keys and locked her out of their residence.<sup>63</sup> After she gained entry to the residence, he hit her and pushed her through a window.<sup>64</sup> Finally, in June 2002, Mr. Dear's next-door neighbor told police that he had been making "unwanted advancements" toward her for a year.<sup>65</sup> That May, she had caught Mr. Dear hiding in the bushes next to her house at 5:30 AM.<sup>66</sup> According to court records, she obtained a restraining order against him in July.<sup>67</sup>

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54. William Wan, *Before Colorado Shooting, A Trail of Allegations of Violence Against Women*, WASH. POST (Dec. 1, 2015), [https://www.washingtonpost.com/national/before-colorado-shooting-a-long-history-of-violence-against-women/2015/12/01/7f494c86-987b-11e5-8917-653b65c809eb\\_story.html](https://www.washingtonpost.com/national/before-colorado-shooting-a-long-history-of-violence-against-women/2015/12/01/7f494c86-987b-11e5-8917-653b65c809eb_story.html) [https://perma.cc/YA42-L2EW].

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.*

61. *Id.*

62. Samantha Allen, *Alleged Planned Parenthood Shooter Robert Lewis Dear Was Accused of Domestic Violence and Leering*, DAILY BEAST (Nov. 28, 2015), <http://www.thedailybeast.com/articles/2015/11/28/alleged-planned-parenthood-shooter-robert-lewis-dear-s-history-of-trouble-with-the-law.html> [https://perma.cc/E648-FH7G].

63. *Id.*

64. *Id.*

65. Wan, *supra* note 54.

66. *Id.*

67. Allen, *supra* note 62.

Similarly, in November 2017, Kevin Janson Neal killed five people and injured ten others in Northern California.<sup>68</sup> He had been about to stand trial for attacking women in his community, one of whom he killed in the shooting.<sup>69</sup> In November 2016, deputies were called to investigate an altercation between Mr. Neal and his neighbor, in which Mr. Neal punched her in the face.<sup>70</sup> Deputies referred the case to the District Attorney's office, but prosecutors declined to pursue the matter.<sup>71</sup> Then, in January 2017, Mr. Neal was arrested for assaulting two other neighbors.<sup>72</sup> He allegedly shot at the women, stabbed one of them, and held them hostage.<sup>73</sup> One of the women filed for a restraining order a week later,<sup>74</sup> which was issued in late February.<sup>75</sup>

In June 2018, Jarrod W. Ramos killed five people in the newsroom of a Maryland newspaper.<sup>76</sup> His feud with the newspaper apparently began with a 2011 article that detailed his harassment of a high school classmate.<sup>77</sup> According to the piece, Mr. Ramos sent the woman a friend request on Facebook.<sup>78</sup> What followed were months of emails in which Mr. Ramos alternately asked for help and called the woman vulgar names.<sup>79</sup> "He seems to think there's some sort of relationship here that does not exist," the woman told a judge.<sup>80</sup> "I tried to back away from it, and he just started getting angry and vulgar to the point I had to tell him to stop."<sup>81</sup> After she told him not to contact her again, Mr. Ramos wrote

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68. Fuller, *supra* note 28.

69. Linley Sanders, *Who Is Kevin Jansen Neal? California School Shooter Was Another Angry White Man with A Record of Violence Against Women*, NEWSWEEK (Nov. 15, 2017), <http://www.newsweek.com/who-kevin-jansen-neal-white-male-shooter-was-about-face-trial-711928> [<https://perma.cc/EX9W-TK9B>].

70. Dale Kasler, *Tehama Deputies were Called 21 Times to Gunman's Neighborhood in the Months Before Shooting Spree*, SACRAMENTO BEE (Nov. 21, 2017), <http://www.sacbee.com/news/local/crime/article185810693.html> [<https://perma.cc/KU9C-2KF2>].

71. *Id.*

72. Sam Stanton, Dale Kasler & Randall Benton, *'A Madman on the Loose.' Tehama Shooter Began Spree by Killing his Wife, Hiding her Body, Sheriff Says*, SACRAMENTO BEE (Nov. 15, 2017), <http://www.sacbee.com/news/local/crime/article184754473.html> [<https://perma.cc/3DP5-B7T6>].

73. *Id.*

74. *California Shooting Gunman's Neighbor Lived in Fear of Him*, CBS NEWS (Nov. 16, 2017), <https://www.cbsnews.com/news/california-shooting-kevin-janson-neal-neighbor> [<https://perma.cc/28TB-7GML>].

75. Stanton et al., *supra* note 72.

76. Timothy Williams & Amy Harmon, *Maryland Shooting Suspect Had Long-Running Dispute With Newspaper*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2018/06/29/us/jarrodramos-annapolis-shooting.html> [<https://perma.cc/A6F8-9Q39>].

77. *Id.*

78. Scott Neuman, *What We Know About the Alleged Gunman at a Maryland Newsroom*, N.P.R. (June 29, 2018), <https://www.npr.org/2018/06/29/624558184/what-we-know-about-the-alleged-gunman-at-a-maryland-newspaper?t=1534423823216> [<https://perma.cc/8LV7-5ZXX>].

79. *Id.*

80. Williams & Harmon, *supra* note 76.

81. *Id.*

that the woman should hang herself.<sup>82</sup> The woman brought a harassment case, and Mr. Ramos pleaded guilty to the misdemeanor charge.<sup>83</sup>

In July 2016, Micah Johnson killed five Dallas police officers.<sup>84</sup> Two years prior, Mr. Johnson had returned from serving in Afghanistan to face charges after a female corporal filed a sexual harassment complaint against him.<sup>85</sup> According to the corporal, as well as one of Mr. Johnson's bunkmates, Mr. Johnson had a habit of stealing women's underwear.<sup>86</sup> The corporal sought an order of protection against Mr. Johnson and suggested he receive mental health treatment.<sup>87</sup>

Finally, though Devin P. Kelley was charged with a crime of domestic violence, he had also been investigated for rape and sexual assault and had a history of harassing ex-girlfriends. Soon after the Sutherland Springs shooting, authorities released records showing that Mr. Kelley had been the subject of an investigation for sexual assault and rape in 2013.<sup>88</sup> No charges were ever filed.<sup>89</sup> Additionally, two of Mr. Kelley's ex-girlfriends told NBC News that Mr. Kelley had stalked them after breakups. "Years after dating me he would try to bribe me to hang out with him," said Katy Landry.<sup>90</sup> "He ended up assaulting me. He would stalk me by repeatedly calling me — even prank calling me, saying really weird stuff."<sup>91</sup> Similarly, Brittany Adcock described how when she broke off her relationship with Mr. Kelley, he continued to harass her. "He somehow would always find out my number . . . and he would constantly call me until I blocked his number," she said.<sup>92</sup> "Then I'd get calls from an unknown number so I've had to change my number quite a bit."<sup>93</sup> She added that Mr. Kelley "would offer me money to hang out with him quite a bit. There has been one point that I called the police because he was just calling me so much. . . ."<sup>94</sup>

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82. *Id.*

83. *Id.*

84. Michael Daly, *Micah Johnson Was Kicked Out of the Army for Stealing Panties*, DAILY BEAST (July 9, 2016), <http://www.thedailybeast.com/articles/2016/07/09/inside-the-fall-of-the-dallas-shooter.html> [<https://perma.cc/UB9F-EDMX>].

85. *Id.*

86. *Id.*

87. *Id.*

88. Montgomery et al., *supra* note 7.

89. *Id.*

90. Tim Stelloh, Caitlin Fichtel & Tracy Connor, *Who Is Devin Kelley, the Texas Church Shooter?*, NBC NEWS (Nov. 6, 2017), <https://www.nbcnews.com/storyline/texas-church-shooting/who-devin-kelley-alleged-texas-church-shooter-n817806> [<https://perma.cc/U6GQ-JKG3>].

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

## 2. *Mass Shootings Carried Out by Students*

Elliot Rodger, Seung-Hui Cho, and Nikolas Cruz were never charged with crimes of domestic violence before they carried out school shootings, but all three had a history of stalking or harassment.

In May 2014, Elliot Rodger went on a shooting rampage near the University of California, Santa Barbara campus that killed six people and wounded fourteen more.<sup>95</sup> Mr. Rodger was deeply involved with “men’s rights” communities online and had created several videos about his frustration over women’s rejection of him.<sup>96</sup> On the evening before the shooting, Mr. Rodger emailed a manifesto to his family and other individuals and posted a new video online.<sup>97</sup> In the video, Mr. Rodger expressed anger that he was still a virgin at age twenty-two.<sup>98</sup> He explained that he did not know why girls were not attracted to him, as he was the “perfect guy.”<sup>99</sup> “I am magnificent,” he said.<sup>100</sup> “I am the ultimate gentleman.”<sup>101</sup> His state of affairs was therefore “not fair,” and he promised to “punish all you girls for it.”<sup>102</sup> Women who had rejected him would finally see that he was “in truth, the superior one, the true alpha male.”<sup>103</sup> He then promised to enter the “hottest sorority” and “slaughter every single spoiled, stuck-up blonde slut” he found.<sup>104</sup> “If I can’t have you,” he concluded, “I will destroy you.”<sup>105</sup>

Similarly, in April 2007, Seung-Hui Cho killed thirty-two people and wounded seventeen others at Virginia Polytechnic Institute and State University.<sup>106</sup> In 2005, Mr. Cho’s professor had removed him from her class

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95. S.E. Smith, *It’s Time to Make Domestic Violence a Primary Focus—And Not Only Because So Many Perpetrators Go on to Commit Mass Shootings*, XOJANE (July 21, 2016), <http://www.xojane.com/issues/domestic-violence-mass-shootings> [https://perma.cc/K7AZ-SLSE].

96. *Mass Shootings, Misogyny, and the Aggrieved Entitlement Of White Males*, PUB. HEALTH WATCH (May 26, 2014), [hereinafter *Mass Shootings, Misogyny*] <https://publichealthwatch.wordpress.com/2014/05/26/mass-shootings-misogyny-and-the-aggrieved-entitlement-of-white-males> [https://perma.cc/6V5P-ZM7H].

97. Dan Good, Clayton Sandell & Cecilia Vega, *Elliot Rodger’s Previous Attacks on Women, Couples*, YAHOO! NEWS: GOOD MORNING AMERICA (May 27, 2015), <https://gma.yahoo.com/elliott-rodgers-previous-attacks-women-couples-135909744--abc-news-topstories.html> [https://perma.cc/F7NE-UHRW].

98. *Mass Shootings, Misogyny*, *supra* note 96.

99. *Id.*

100. *Id.*

101. *Id.*

102. Laurie Essig, *Elliot Rodger and the Problem with Manhood*, PSYCHOL. TODAY (May 25, 2014), <https://www.psychologytoday.com/blog/love-inc/201405/elliott-rodger-and-the-problem-manhood> [https://perma.cc/23CA-LJJZ].

103. Traister, *supra* note 38.

104. Essig, *supra* note 102.

105. *Id.*

106. John L. Oliffe et al., *Men, Masculinities, and Murder-Suicide*, 9 AM. J. MEN’S HEALTH 473 (2015).

because he was photographing female students under their desks.<sup>107</sup> Additionally, Mr. Cho's roommates claimed that he had been involved in two stalking incidents.<sup>108</sup> In the first alleged incident, Mr. Cho's roommate claimed that Mr. Cho went to a female student's room to "look her in the eye," at which point the female student called campus police.<sup>109</sup> Mr. Cho later allegedly commented that he had found "promiscuity" in her eyes.<sup>110</sup> In the second alleged incident, Mr. Cho allegedly found out where one of his roommates' female friends lived and wrote a message to her on her door.<sup>111</sup> The woman also contacted campus police.<sup>112</sup>

Finally, in February 2018, Nikolas Cruz killed seventeen people at Marjory Stoneman Douglas High School in Parkland, Florida.<sup>113</sup> Mr. Cruz was expelled from the school in 2017 for what the local sheriff called "disciplinary reasons."<sup>114</sup> Connor Dietrich, a classmate of Mr. Cruz's, told the New York Post that Mr. Cruz was expelled because he was fighting with his ex-girlfriend's new boyfriend.<sup>115</sup> "[Mr. Cruz] stalked her and threatened her," Mr. Dietrich said.<sup>116</sup> "He was like, 'I'm going to kill you,' and he would say awful things to her and harass her to the point I would walk her to the bus just to make sure she was OK. We all made sure she was never alone."<sup>117</sup> Another classmate, Ariana Lopez, also told the press that Mr. Cruz dated a student at the school who became terrified of him. "Things got weird fast," she claimed.<sup>118</sup> "He hit her and he would send her very violent accusing messages saying she was cheating on him with other friends, that she didn't deserve him, he was going to kill her. She had marks. She was scared of him."<sup>119</sup>

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107. John Cloud, *The Question Mark in Harper Hall*, TIME (April 18, 2007), <http://content.time.com/time/nation/article/0,8599,1612003,00.html> [https://perma.cc/C9GD-PSNA].

108. Adam Geller, *Va. Gunman Had 2 Past Stalking Cases*, ASSOCIATED PRESS (Apr. 18, 2007), <https://web.archive.org/web/20080509004315/http://www.newsday.com/news/nationworld/nation/ny-ustech-side,0,7759008.story> [https://perma.cc/9DVN-YUY5].

109. Michael E. Ruane, *'Looking Back . . . We Should Have Done Something,'* WASH. POST (Apr. 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/21/AR2007042101223.html> [https://perma.cc/5D75-DN7X].

110. *Id.*

111. *Id.*

112. *See id.*

113. *See* Remy Smidt, *The Florida Shooting Suspect Snapped into a Jealous Rage when Another Student Began Dating His Ex-Girlfriend*, BUZZFEED NEWS (Feb. 17, 2018), [https://www.buzzfeed.com/remysmidt/cruz?utm\\_term=.ltxaJ0k5#.omlD90YZ](https://www.buzzfeed.com/remysmidt/cruz?utm_term=.ltxaJ0k5#.omlD90YZ) [https://perma.cc/38FQ-XXEL].

114. *Id.*

115. Gabrielle Fonrouge & Ruth Brown, *Alleged School Shooter was Abusive to Ex-Girlfriend: Classmate*, N.Y. POST (Feb. 15, 2018), <https://nypost.com/2018/02/15/alleged-school-shooter-was-abusive-to-ex-girlfriend-classmate> [https://perma.cc/87SA-PARH].

116. *Id.*

117. *Id.*

118. *Parkland School Shooting: Student Says She Was Stalked by Nikolas Cruz Prior to Attack*, INSIDE EDITION (Feb. 20, 2018), <http://www.insideedition.com/parkland-school-shooting-student-says-she-was-stalked-nikolas-cruz-prior-attack-40890> [https://perma.cc/CUJ6-6TVB].

119. *Id.*

## II.

UNDERSTANDING THE CONNECTION BETWEEN MASS SHOOTINGS AND  
VIOLENCE AGAINST WOMEN: A HEGEMONIC MASCULINITY PERSPECTIVE

The number of mass murders in the United States saw a significant increase in the 1970s.<sup>120</sup> As mass murder was defined as a distinct phenomenon only in the 1980s, its academic study is relatively new and research about it limited.<sup>121</sup> However, several characteristics and patterns differentiate mass murder from other forms of homicide. First, mass murderers are more likely to be male than are typical homicide perpetrators. According to a 2012 study, 88.3 percent of homicide perpetrators are male.<sup>122</sup> By contrast, 93.4 percent of mass murderers are men.<sup>123</sup> A separate 2012 study found that of the sixty-five mass shootings that have occurred over the past thirty years, only one was committed by a woman.<sup>124</sup> Mass shootings are thus “a profoundly masculine act.”<sup>125</sup> Second, mass murder is the only subset of homicide that is a predominantly white phenomenon. Whites commit mass murder in numbers disproportionately high compared to their share of the population. According to a 1998 study, 69.9 percent of American mass killers are white, while whites make up only 63.7 percent of the population.<sup>126</sup>

So why, then, do so many white males carry out mass shootings? The strain theory perspective posits that a perpetrator of mass murder goes through several sequential stages leading up to an act of violence. First, he experiences chronic strain, resulting from difficulties in childhood or adolescence.<sup>127</sup> Experiencing chronic strain influences how he perceives acute losses or life stressors, known as precipitating factors, which trigger uncontrolled strain.<sup>128</sup> The acute strain stage follows, in which the perpetrator plans to regain control of the situation through violence.<sup>129</sup> Kevin Cameron, executive director of the Canadian Center for Threat Assessment and Trauma Response, describes the process as follows: “In almost all high-end mass killings, the perpetrator’s thinking evolves[] . . . They have a passing thought. They think about it more, they

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120. Eric Madfis, *Triple Entitlement and Homicidal Anger: An Exploration of the Intersectional Identities of American Mass Murderers*, 17 *MEN & MASCULINITIES* 67, 69 (2014).

121. *Id.* at 70; Kennedy-Kollar & Charles, *supra* note 50, at 63.

122. Madfis, *supra* note 120, at 78.

123. *Id.*

124. Mark Follman, Gavin Aronsen & Deanna Pan, *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 14, 2018), <http://www.motherjones.com/politics/2012/07/mass-shootings-map?page=2> [<https://perma.cc/5G8T-TCTV>].

125. Madfis, *supra* note 120, at 77.

126. *Id.* at 71.

127. Kennedy-Kollar & Charles, *supra* note 50, at 64.

128. *See id.*; Madfis, *supra* note 120, at 74.

129. *See* Kennedy-Kollar & Charles, *supra* note 50, at 64.

fantasize, they slowly build a justification. They prepare, and then when the right set of circumstances comes along, it unleashes the rage.”<sup>130</sup>

Several scholars have examined the stressors that trigger uncontrolled strain. Denise Kennedy-Kollar and Christopher A.D. Charles gathered biographical information for twenty-eight men who have committed mass murder in the United States since 1970.<sup>131</sup> John L. Oliffe analyzed 296 newspaper articles describing forty-five North American murder-suicide cases.<sup>132</sup> Kimmel and Matthew Mahler examined twenty-eight cases of school shootings in the United States from 1982 to 2001.<sup>133</sup> Eric Madfis investigated the relationship between mass murder and the convergences of white entitlement, middle-class instability, and heterosexual masculinity.<sup>134</sup> All these scholars found some relation between the perceived affronts that triggered the mass murders and a hegemonic construction of the perpetrators’ masculine identities.

Conceived of by the sociologist R.W. Connell, the hegemonic masculinity framework describes the socially constructed criteria that define who is and is not a “real” man.<sup>135</sup> Hegemonic masculinity is characterized by power, authority, and physical strength, as well as competitiveness, self-reliance, and stoicism.<sup>136</sup> The characteristics central to hegemonic masculinity are learned from an early age and reinforced throughout adolescence and adulthood.<sup>137</sup> Hegemonic masculinity thus informs normative male behavior.<sup>138</sup> These behaviors create a patriarchal system that marginalizes and subordinates women.<sup>139</sup> This toxic construction of masculinity is hegemonic not only in relation to women, however, but also in relation to other men. Hegemonic masculinity collaborates with racism, homophobia, classism, and other forms of prejudice to guarantee the dominance of a particular construction of masculinity over others.<sup>140</sup> As Kimmel and Amy Aronson put it,

[I]n an important sense there is only one complete unblushing male in America: a young, married, white, urban, northern, heterosexual, Protestant, father, of college education, fully employed, of good complexion, weight, and height, and a recent record in sports . . . Any male who fails to qualify in any one of these ways is likely to view

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130. See Benedict Carey, *Are Mass Murderers Insane? Usually Not, Researchers Say*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/health/mass-murderers-mental-illness.html> [<https://perma.cc/N84K-ZKVD>].

131. Kennedy-Kollar & Charles, *supra* note 50, at 62.

132. Oliffe et al., *supra* note 106, at 473.

133. Michael S. Kimmel & Matthew Mahler, *Adolescent Masculinity, Homophobia, and Violence: Random School Shootings, 1982-2001*, 46 AM. BEHAV. SCIENTIST 1439 (2003).

134. Madfis, *supra* note 120, at 68.

135. R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON, AND SEXUAL POLITICS* (1987).

136. Kennedy-Kollar & Charles, *supra* note 50, at 65; Oliffe et al., *supra* note 106, at 474.

137. See Oliffe et al., *supra* note 106, at 474.

138. See *id.*

139. *Id.*

140. *Mass Shootings, Misogyny*, *supra* note 96.



himself— during moments at least— as unworthy, incomplete and inferior.<sup>141</sup>

One component of the hegemonic masculine identity is the ability to maintain gainful employment and economic independence, infringement upon which prompted a significant number of the men in these studies to embark on rampages. Seventy-one percent of the men in Kennedy-Kollar and Charles's sample experienced financial stressors in the form of unemployment, debt, financial loss, and poor job performance or a work-related reprimand.<sup>142</sup> Similarly, nine of the murder-suicide cases that Oliffe examined featured a "workplace justice" theme. These cases developed from the men's grievances surrounding job insecurity and perceptions of being bullied or marginalized by coworkers and supervisors.<sup>143</sup> The hegemonic masculinity perspective suggests that insufficient financial resources or job insecurity reduced the men's autonomy and independence. They viewed these stressors as threats to their self-image as providers: threats with which they were unable to cope. Obstacles to financial success thus led these men to take one final violent act in order to regain power and domination. These acts were "essentially shows of status, a way to tell the world that [they were] still important, authoritative, and accomplished."<sup>144</sup>

A second component of the hegemonic masculine identity that was denied to the men in these studies is the ability to exert social dominance and command respect. Sixty-one percent of the men in Kennedy-Kollar and Charles's sample experienced social stressors such as bullying, social isolation, and racial or ethnic harassment.<sup>145</sup> Similarly, nine of the murder-suicide cases that Oliffe examined occurred in school settings and were closely connected to "pay-back" for the alleged bullying the perpetrators had endured.<sup>146</sup> Lastly, nearly all of the school shooters that Kimmel and Mahler examined had been bullied, beat up, threatened, and—most significantly—"gay-baited," or taunted with homophobic slurs.<sup>147</sup> This torment took place not because the perpetrators were gay, but because they were *different* from the other boys at school, whether "shy, bookish, honor students, artistic, musical, theatrical, nonathletic, 'geekish,' or 'weird.'"<sup>148</sup> Thus, the perpetrators were harassed for inadequate gender performance: a failure to conform to the norms of hegemonic masculinity.

A third expectation that hegemonic masculinity places on men, and that the men in these studies struggled to live up to, is the ability to demonstrate romantic and sexual success. Twenty-five percent of the men in Kennedy-Kollar and

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141. *Id.*

142. Kennedy-Kollar & Charles, *supra* note 50, at 68.

143. See Oliffe et al., *supra* note 106, at 480.

144. Madfis, *supra* note 120, at 77.

145. Kennedy-Kollar & Charles, *supra* note 50, at 67.

146. See Oliffe et al., *supra* note 106, at 481.

147. Kimmel & Mahler, *supra* note 133, at 1440.

148. *Id.* at 1445.

Charles's sample had experienced divorce, a breakup, or rejection of romantic or sexual overtures prior to the mass shootings.<sup>149</sup> In these cases, threats to the men's ability to dictate the outcomes of their relationships may have made them feel emasculated, leading them to reassert themselves through acts of violence.<sup>150</sup>

Examining the stressors that trigger mass murder elucidates the connection between mass shootings and violence against women. Acts of violence against women such as domestic violence, stalking, and sexual assault suggest that perpetrators aspire to the norms of hegemonic masculinity, the keystone of a patriarchal system that marginalizes and subordinates women. Subscribers to this construction of masculinity, however, see violence as a justified response not only to women who affront them, but also to members of a society they perceive as emasculating them. Therefore, the law should treat acts of violence against women, including stalking and sexual assault, as red flags for larger-scale acts of violence, and proof of these acts' commission should prevent the perpetrators from acquiring guns.

### III.

#### EXPANDING THE LAUTENBERG AMENDMENT TO APPLY TO INDIVIDUALS CONVICTED OF MISDEMEANOR STALKING AND SEXUAL ASSAULT

##### A. *Background*

###### 1. *The Gun Control Act of 1968*

In 1968, Congress passed the Gun Control Act.<sup>151</sup> The primary purpose of the Act is to withhold access to guns from individuals perceived to be dangerous.<sup>152</sup> Accordingly, Sections 922(d) and (g) create classes of individuals who are disqualified from buying or owning guns.<sup>153</sup> These individuals include persons convicted of felonies (the "felon-in-possession law"), drug addicts, minors, persons with mental illnesses, persons dishonorably discharged from the military, undocumented immigrants, and persons who have renounced their US citizenship.<sup>154</sup> Under Section 922(d), a weapons dealer is prohibited from selling or distributing guns to anyone who falls within one of the disqualified classes.<sup>155</sup> Similarly, Section 922(g) prohibits disqualified individuals from transporting or possessing guns.<sup>156</sup> The Gun Control Act had an indirect effect in the fight against domestic violence, as convictions for domestic violence felonies

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149. Kennedy-Kollar & Charles, *supra* note 50, at 69.

150. *Id.* at 70.

151. Alison J. Nathan, *At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment*, 85 CORNELL L. REV. 822, 833 (2000).

152. *Id.*

153. *Id.* at 834.

154. *Id.*

155. *Id.*

156. *Id.*

prevented abusers from possessing guns. However, many abusers continued to buy and own guns because they were convicted under misdemeanor statutes, and prior to the Lautenberg Amendment, conviction of a misdemeanor crime of domestic violence had no consequences for gun ownership.<sup>157</sup>

## 2. *Amending the Gun Control Act*

The passing of legislation to combat domestic violence is a recent phenomenon. The mid-1980s marked a turning point in the development of a tactical response to domestic violence.<sup>158</sup> Informed by the battered women's movement and the first research experiments on domestic violence, policymakers began reassessing their traditional approaches to the problem.<sup>159</sup> At first, action was taken at the state and local level.<sup>160</sup> By the early 1990s, however, Congress had embraced the conception of domestic violence as a national epidemic and enacted the first domestic-violence-specific amendment to the Gun Control Act in 1994.<sup>161</sup> Eighteen U.S.C. § 922(g)(8) prohibits anyone subject to certain protective orders from owning or possessing a gun.<sup>162</sup> In order for the prohibition to go into effect, the protective orders must restrain harassment, stalking, or threatening of an "intimate partner."<sup>163</sup> Similarly, 18 U.S.C. § 922(d)(8) prohibits individuals from selling or transferring a gun to someone they know is subject to a restraining order or they should reasonably believe to be subject.<sup>164</sup> Both provisions impose additional requirements that the restraining order must meet. First, the restraining order must have been issued after a hearing of which the respondent received notice and in which he had the opportunity to participate.<sup>165</sup> Second, the restraining order must include a finding that the respondent poses a threat to the physical safety of his intimate partner or child.<sup>166</sup> Third, the restraining order must prohibit the use, attempted use, or threatened use of physical force by the respondent against his intimate partner or child.<sup>167</sup> Though these amendments constituted a step in the right direction, the gap in coverage of gun control laws over abusers persisted. As Richard Aborn, former president of the Brady Center, described, "[t]he question kept coming up, what about domestic violence, because its [*sic*] often a misdemeanor, and we

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157. See Bethany A. Corbin, *Goodbye Earl: Domestic Abusers and Guns in the Wake of United States v. Castleman—Can the Supreme Court Save Domestic Violence Victims?*, 94 NEB. L. REV. 101, 105, 116 (2015).

158. See Nathan, *supra* note 151, at 829.

159. See *id.* at 829–30.

160. See *id.* at 825.

161. See *id.* at 830–36.

162. 18 U.S.C. § 922(g)(8) (1994).

163. *Id.*

164. 18 U.S.C. § 922(d)(8) (1994).

165. *Id.*; 18 U.S.C. § 922(g)(8) (1994).

166. *Id.*

167. *Id.*

knew that there was a linkage between gun violence and domestic violence . . . That was the birth of the whole conversation.”<sup>168</sup>

### 3. *The Lautenberg Amendment*

#### a. *Legislative History*

Senator Frank Lautenberg introduced his amendment to the Gun Control Act in March 1996.<sup>169</sup> Statements made on the Senate floor reveal that Congress was concerned that state laws classify domestic violence crimes as misdemeanors rather than felonies, which had no consequences for gun ownership at the time.<sup>170</sup> As a result, repeat domestic violence offenders were allowed to possess guns.<sup>171</sup> The Senate adopted the provision as an amendment to the Anti-Stalking Act.<sup>172</sup> When the bill reached the House of Representatives, however, the House refused to support it.<sup>173</sup> In May 1996, the Anti-Stalking Act passed the House, without the Lautenberg Amendment.<sup>174</sup> As a result, Senator Lautenberg blocked a vote on the Anti-Stalking Act in the Senate until the amendment was reintegrated.<sup>175</sup> In July 1996, the legislation was reincorporated into the Anti-Stalking Act.<sup>176</sup> Following numerous delays with the Act, Senator Lautenberg offered the amendment to an appropriations bill.<sup>177</sup> The bill was removed from the floor, so in September 1996, Senator Lautenberg attached the amendment to a federal budget bill, which was considered “must-pass legislation.”<sup>178</sup> The amendment thus passed both the House and the Senate and finally became law.<sup>179</sup>

#### b. *Content*

The Lautenberg Amendment is codified in two sections of Title 18. First, 18 U.S.C. § 922(g)(9) prohibits any person convicted of a misdemeanor crime of domestic violence from “ship[ping] or transport[ing] in interstate or foreign commerce, or possess[ing] in or affecting commerce, any firearm or ammunition; or . . . receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” A misdemeanor crime

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168. Stolberg, *supra* note 6.

169. See Melanie C. Schneider, *The Imprecise Draftsmanship of the Lautenberg Amendment and the Resulting Problems for the Judiciary*, 17 COLUM. J. GENDER & L. 505, 510 (2008).

170. See John M. Skakun III, *Violence and Contact: Interpreting “Physical Force” in the Lautenberg Amendment*, 75 U. CHI. L. REV. 1833, 1834–35 (2008).

171. See *id.*

172. See Schneider, *supra* note 169, at 510.

173. See *id.* at 510.

174. See Corbin, *supra* note 157, at 122.

175. *Id.*

176. *Id.*

177. See *id.* at 123.

178. Schneider, *supra* note 169, at 511.

179. See *id.*

of domestic violence has two elements under 18 U.S.C. § 921(a)(33)(A)(ii). First, the offense “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.”<sup>180</sup> Second, the offense must have been committed against an individual with whom the person is in a domestic relationship.<sup>181</sup> The statute thus applies to a current or former spouse, parent, or guardian of the survivor of the crime, a person with whom the survivor shares a child in common, or a person who is cohabitating with or has cohabitated with the survivor as a spouse, parent, or guardian.<sup>182</sup> Following a conviction for a misdemeanor crime of domestic violence, the abuser must relinquish his guns.<sup>183</sup> Failure to do so can result in a maximum imprisonment of ten years and a \$250,000 fine.<sup>184</sup>

### B. Expanding the Lautenberg Amendment

#### 1. Individuals Convicted of Misdemeanor Stalking

##### a. Background

Until the early 1990s, there was little empirical data on stalking available in the United States.<sup>185</sup> One forensic psychiatrist estimated that 200,000 women were stalked in 1992.<sup>186</sup> In 1993, it was estimated that one in twenty women was stalked.<sup>187</sup> A more accurate picture of stalking emerged from the results of two studies. The first of these, the National Violence Against Women Survey of 1997, found that the number of stalking incidents had increased from earlier estimates. According to the survey, one million women are stalked every year.<sup>188</sup> The second of these studies, the Department of Justice’s Supplemental Victimization Survey of 2006, found that 3.4 million people over the age of eighteen are stalked each year.<sup>189</sup> Additionally, survivors of stalking are predominantly female, and perpetrators are predominantly male. The National Violence Against Women Survey found that 78 percent of stalking survivors are

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180. 18 U.S.C. § 921(a)(33)(A)(ii) (2014).

181. *Id.*

182. *Id.* The Lautenberg Amendment uses the term “victim” to describe those who have endured domestic violence and come out on the other side. In an effort to avoid further disempowerment of such individuals, this Note uses the term “survivor” instead.

183. Corbin, *supra* note 157, at 121.

184. *Id.*

185. THE MODEL STALKING CODE REVISITED: RESPONDING TO THE NEW REALITIES OF STALKING, NAT’L CTR. FOR VICTIMS OF CRIME 12 (2007), [http://victimsofcrime.org/docs/PDFs/MODEL\\_CODE\\_2007.pdf?sfvrsn=0](http://victimsofcrime.org/docs/PDFs/MODEL_CODE_2007.pdf?sfvrsn=0) [https://perma.cc/Z7WR-TXN3].

186. Belinda Wiggins, *Stalking Humans: Is There A Need for Federalization of Anti-Stalking Laws in Order to Prevent Recidivism in Stalking?*, 50 SYRACUSE L. REV. 1067, 1071–72 (2000).

187. *Id.* at 1072.

188. *Id.*

189. Ashley N. B. Beagle, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 458 (2011).

women, and 87 percent of perpetrators are men.<sup>190</sup> Further, 94 percent of women and 60 percent of men are stalked by men.<sup>191</sup> Stalking, like mass shootings, is “a profoundly masculine act.”<sup>192</sup>

*b. Definition*

All fifty states, the District of Columbia, and the federal government have passed statutes that criminalize stalking.<sup>193</sup> The definition of stalking in these statutes varies. Most statutes define stalking as a course of conduct directed at a person that places that person or others in fear for their safety.<sup>194</sup> A course of conduct is defined as one or more intentional acts that evidence a continuity of purpose.<sup>195</sup> Most states recognize that a range of acts may fall within this definition.<sup>196</sup> However, the acts must constitute repeated harassment or threatening behavior, rather than isolated instances of criminal behavior.<sup>197</sup> Some statutes require the perpetrator to have intended to cause fear in the survivor, while others require him only to have intended to commit the act that caused the survivor’s fear.<sup>198</sup> Further, while some states require the perpetrator to have caused the survivor actual fear, others require him to have caused a reasonable person to have felt fear.<sup>199</sup> Some states require both actual fear and proof that a reasonable person would have felt fear.<sup>200</sup> Lastly, states vary on the issue of how much fear the survivor must have experienced in order to criminalize the perpetrator’s actions.<sup>201</sup>

*c. Classification*

Most states can prosecute stalking as either a misdemeanor or a felony. Fifteen states and territories classify stalking as a felony on the first offense, which is the minority approach.<sup>202</sup> Thirty-eight states and territories, along with the District of Columbia, classify stalking as a misdemeanor on the first offense and as a felony either on the second offense or when aggravating factors are

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190. THE MODEL STALKING CODE REVISITED, *supra* note 185, at 13.

191. *Id.*

192. Madfis, *supra* note 120, at 77.

193. Mark Irving, *Domestic Violence*, 4 GEO. J. GENDER & L. 451, 455 (2002).

194. Amy C. Radosevich, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today’s Stalker?*, 2000 U. ILL. L. REV. 1371, 1373 (2000).

195. *Id.* at 1382.

196. Irving, *supra* note 193, at 458.

197. Beagle, *supra* note 189, at 459.

198. Irving, *supra* note 193, at 459.

199. THE MODEL STALKING CODE REVISITED, *supra* note 185, at 35–36.

200. *Id.* at 35.

201. *Id.* at 38–39.

202. Melissa A. Knight, *Stalking and Cyberstalking in the United States and Rural South Dakota: Twenty-Four Years After the First Legislation*, 59 S.D. L. REV. 392, 409 (2014).

present.<sup>203</sup> In one state, Maryland, stalking is always classified as a misdemeanor.<sup>204</sup>

*d. Expanding the Lautenberg Amendment*

There are many justifications for classifying stalking as a misdemeanor on the first offense. Americans, and feminists in particular, should have a strong interest in seeing an end to the carceral state, in which disproportionate numbers of poor people and people of color languish behind bars. However, the assumption that on the first offense, stalking is an isolated incident, rather than a red flag for future violence, should not be among these justifications.

Research shows that stalking is closely linked to domestic violence. According to estimates by the National Organization for Victim Assistance in 1993, 75 to 80 percent of stalking cases in the United States are related to domestic violence.<sup>205</sup> Of the female stalking survivors surveyed in the National Violence Against Women Survey, 77 percent were stalked by someone they knew, and 59 percent were stalked by an intimate partner or former intimate partner.<sup>206</sup>

Most importantly, research suggests that the occurrence of stalking indicates that the cycle of violence is approaching its all-too-frequent endpoint: femicide.<sup>207</sup> The Intimate Partner Stalking and Femicide Study of 1999 found that 76 percent of femicide victims and 85 percent of survivors of attempted femicide in the United States had been stalked by their intimate partners within a year of their murders or attempted murders.<sup>208</sup> This link may be due to the fact that stalking tends to occur around the time of separation between a survivor and her abuser, one of the most dangerous times for the survivor in the course of the relationship. When a survivor leaves an abusive relationship, the risk of violence usually increases because she has challenged the abuser's exercise of power and control.<sup>209</sup> The abuser typically lashes out in an attempt to regain power and control, demonstrating behaviors including physical violence and stalking.<sup>210</sup> When the abuser realizes that he has permanently lost control, he may decide that if he cannot "have" the survivor, then no one else should either. Thus, the survivor, and potentially her family members and neighbors, may fall victim to the abuser's rage.

Consequently, stalking is a red flag for a future act of violence. However, because most states classify stalking on the first offense as a misdemeanor, and conviction of a misdemeanor stalking crime has no consequences for gun

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203. *Id.*

204. *Id.* at 410.

205. Radosevich, *supra* note 194, at 1375.

206. THE MODEL STALKING CODE REVISITED, *supra* note 185, at 13.

207. *Id.*

208. *Id.*

209. *Id.* at 14.

210. *Id.*

ownership, perpetrators who are first-time offenders are free to buy guns once they are released from jail and resume, or possibly escalate, their course of conduct. Indeed, a 2014 review of conviction records in twenty states by the Center for American Progress showed that there are almost 12,000 individuals who have been convicted of misdemeanor stalking but are still permitted to possess guns under federal law.<sup>211</sup>

Expanding the Lautenberg Amendment to apply to individuals convicted of misdemeanor stalking could correct for this loophole in the law by prohibiting them from possessing guns. An expansion of the Lautenberg Amendment is necessary because the Amendment as it stands, as well as other provisions of the Gun Control Act, cannot sufficiently mitigate the risk of future violence that perpetrators of stalking pose.

To begin, the Lautenberg Amendment's definition of misdemeanor crimes of domestic violence as those that have as an element the use or threatened use of physical force does not include stalking crimes. Most statutes define stalking as a course of conduct directed at a person that places that person in fear for his or her safety.<sup>212</sup> A range of acts, presumably including those involving physical contact, may fall within this definition.<sup>213</sup> However, stalking does not have as an *element* the use or threatened use of physical force, as required by the Lautenberg Amendment.<sup>214</sup> As a result, the Amendment cannot be interpreted to cover those convicted of stalking crimes.

One could argue that 18 U.S.C. § 922(g)(8), which prohibits anyone subject to a protective order from owning or possessing a gun, is sufficient to bar perpetrators of stalking from gun ownership. However, the requirement that the restraining order be issued after a hearing of which the respondent received notice and in which he had an opportunity to participate, though necessary for due process, leaves gaps in the statute's protections.

First, many judges issue temporary restraining orders (TROs) without requiring the respondent's presence. In all fifty states, a judge may issue a TRO without the respondent's presence if the petitioner demonstrates an urgent need for protection.<sup>215</sup> Thus, TROs generally do not prohibit the individuals against whom they are issued from buying or owning guns. The TRO remains in force until the court holds a hearing, of which the respondent is notified (through being served with the TRO) and in which the individual is given an opportunity to participate.<sup>216</sup> At that point, if the restraining order is made permanent, the Gun Control Act's prohibition on gun possession will kick in. However, in most states the judge is not required to schedule the hearing until two to four weeks after the

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211. Stolberg, *supra* note 6.

212. Radosevich, *supra* note 194, at 1373.

213. Irving, *supra* note 193, at 458.

214. 18 U.S.C. § 921(a)(33)(A)(ii) (2014).

215. Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 564 (2003).

216. *Id.* at 564–65.



TRO issues.<sup>217</sup> This creates grave dangers for petitioners after they obtain TROs. Since domestic violence is often rooted in an abuser's need to exert control, "issuing a protective order can be like pulling the pin from a grenade".<sup>218</sup> Indeed, one third of homicides related to intimate partner violence occur within one month of the issuance of a restraining order, and one fifth within two days, according to a 2008 study.<sup>219</sup> Fifty-five percent of those homicides involved a firearm.<sup>220</sup>

Second, the petitioner is often unable to serve the respondent with the TRO, which includes notice of a hearing, due to limited resources or fear.<sup>221</sup> When this occurs, the petitioner must continue to renew the TRO, during which time her abuser remains free to purchase a gun.<sup>222</sup>

Third, due to the increasing use of mediation in family law disputes, many couples stipulate to restraining orders without scheduling a hearing.<sup>223</sup> Because these cases do not offer the respondent an opportunity to participate in a hearing, they may not satisfy the Gun Control Act's requirements.<sup>224</sup>

Fourth, even a permanent restraining order must meet other statutory requirements. The order must include a finding that the respondent poses a threat to the physical safety of his intimate partner or child and prohibit his use, attempted use, or threatened use of physical force against his intimate partner or child.<sup>225</sup> Permanent restraining orders are issued by some of the busiest judges in the United States.<sup>226</sup> These judges may very well lack the time and resources necessary to create the record required by the statute.<sup>227</sup>

## 2. *Individuals Convicted of Misdemeanor Sexual Assault*

### a. *Background*

Professor Michelle J. Anderson describes the classic rape narrative as follows:

A fair young woman is walking home alone at night. . . . Suddenly, . . . a strange, dark man lunges out at her, knife at her throat, and drags her into a dark alley where he threatens to kill her, and beats her until she bleeds. The young woman puts up a valiant fight to protect her sexual

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217. *Id.* at 565.

218. *When Abusers Are Most Lethal*, N.Y. TIMES: THE HOME FRONT, PT. 4 (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/opinion/restraining-order-gun-violence.html> [<https://perma.cc/KU9V-GPCQ>].

219. *Id.*

220. *Id.*

221. *See* Lininger, *supra* note 215 at 567.

222. *Id.*

223. *Id.* at 568.

224. *Id.*

225. 18 U.S.C. §§ 922(g)(8), (d)(8) (1994).

226. Lininger, *supra* note 215, at 571.

227. *Id.*

virtue, but the assailant overcomes her will and rapes her.<sup>228</sup>

This type of rape is a statistical outlier, woven from a racist and sexist mythology.<sup>229</sup> Anderson contrasts this narrative with what she terms the “all-American rape”: the statistical norm of sexual assault.<sup>230</sup> To begin, the typical rape is not committed by a stranger. Acquaintances and intimate partners commit the vast majority of rape.<sup>231</sup> The typical rape does not involve a black man attacking a white woman. Rape is overwhelmingly an intra-racial crime.<sup>232</sup> Most importantly, the typical rape does not involve weapons. Many perpetrators of rape find verbal and physical coercion sufficient.<sup>233</sup> Further, the typical rape does not involve physical resistance from the survivor. Many survivors cry or remain passive in the face of a sexual attack.<sup>234</sup> This Section argues that the Lautenberg Amendment should be expanded to apply to those convicted of a sex crime encompassed by the “all-American rape”: non-consensual penetration committed without the use of force.

#### *b. Definition and Classification*

Use of force requirements for sexual assault convictions vary among the states. In order to be convicted of a state’s highest, non-aggravated sexual offense, forty-three states and the District of Columbia require that the perpetrator use force against his victim.<sup>235</sup> Although eight of these forty-four statutes appear to require only non-consent, they include the use of force in the definition of non-consent.<sup>236</sup> Sixteen states and the District of Columbia criminalize non-consensual penetration committed without the use of force.<sup>237</sup> However, more than half of these states classify these offenses as misdemeanors.<sup>238</sup>

#### *c. Expanding the Lautenberg Amendment*

There are many justifications for classifying non-consensual penetration committed without the use of force as a misdemeanor. However, Anderson argues that one justification scholars have adopted rests on the faulty assumption that without an extrinsic, violent assault, there is no harm in rape.<sup>239</sup> For example, Professor Donald Dripps argues that states should criminalize two separate

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228. Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. 625, 625–26 (2005).

229. *Id.* at 626.

230. *Id.* at 626–27.

231. *Id.* at 627.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 629.

236. *Id.* at 630.

237. *Id.* at 631–32.

238. *Id.* at 632.

239. *Id.* at 636.

sexual offenses.<sup>240</sup> While “sexually motivated assault” would mirror the classic rape narrative, “sexual expropriation” would constitute non-consensual penetration committed without the use of force.<sup>241</sup> Dripps describes the harm of “sexual expropriation” as “non-violent” and would classify it as a misdemeanor or minor felony.<sup>242</sup> In defense of his position, Dripps asserts:

Physical violence in general does far more harm to the victim’s welfare than an unwanted sex act. Physical violence in general expresses a more complete indifference, or a more intense hostility, to the victim’s humanity . . . [W]hether measured by the welfare or by the dignity of the victim, as a general matter unwanted sex is not as bad as violence.<sup>243</sup>

Like Dripps, Professor Stephen Schulhofer argues that states should criminalize two separate offenses.<sup>244</sup> While “sexual assault” would criminalize the use of physical force to compel another person to submit to sexual penetration, “sexual abuse” would criminalize non-consensual penetration committed without the use of force.<sup>245</sup> Schulhofer describes “sexual abuse” as a “*nonviolent* interference with sexual autonomy.”<sup>246</sup>

The lived experience of survivors, however, sheds a very different light on the harm of the act. Some commentators have described rape as “social murder,” a crime that causes “a temporary social death.”<sup>247</sup> Many survivors live with the feeling that a part of them has “died”: they are no longer themselves because the sense of autonomy so central to identity has been annihilated.<sup>248</sup> Indeed, Professor Lynne Henderson, a survivor herself, writes about how she believes survivors relate to sexual assault as follows:

Rape denies that you are a person, that you exist . . . [W]omen experience total helplessness and obliteration during rape. When a woman’s existence just does not matter, intercourse becomes rape. Her existence may not matter whether the attack is by a date, a spouse, a friend, or a stranger. Thus, the important factor is non-existence.<sup>249</sup>

The experiences of these survivors likely reflect the classic rape narrative, which remains the public face of rape in the United States.<sup>250</sup> Non-consensual penetration committed without the use of force, by contrast, is almost never discussed.<sup>251</sup> What we do know about survivors of this type of rape, according

240. *Id.* at 637.

241. *Id.* at 637.

242. *Id.*

243. *Id.*

244. *Id.* at 639–40.

245. *Id.*

246. *Id.* at 640 (emphasis added).

247. Abbe Smith, *Representing Rapists: The Cruelty of Cross and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 264 (2016).

248. *Id.*

249. Anderson, *supra* note 228, at 641 (emphasis omitted).

250. *Id.* at 633.

251. *Id.*

to Anderson, is that the psychological damage they suffer is at least as severe as that of survivors of “stranger rape.”<sup>252</sup> In June 2016, a rare account of non-consensual penetration committed without the use of force surfaced.<sup>253</sup> The past year, Brock Turner, a former Stanford University student, had sexually assaulted an unconscious woman he met at a party.<sup>254</sup> She later wrote a victim impact statement, which echoes Professor Henderson’s account. Addressing Mr. Turner, she stated:

My damage was internal, unseen, I carry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, [and] my own voice . . . You made me a victim . . . For a while, I believed that that was all I was. I had to force myself to relearn my real name, my identity. To relearn that this is not all that I am.<sup>255</sup>

This testimony demonstrates that survivors, such as the author of the victim impact statement, may experience non-consensual penetration committed without the use of force as a form of annihilation. But what about perpetrators of these crimes? Do they accordingly experience rape as domination? It is difficult to find studies of individuals like Mr. Turner, likely because sex offenders are made into pariahs and are fearful of further stigmatization.<sup>256</sup> However, evidence suggests that domination is a motivation for rape. One study of “acquaintance rapists” found that these individuals subscribe to the belief that men are supposed to be dominant and women submissive.<sup>257</sup> Another study found that male college students who have engaged in sexually aggressive behaviors are more likely to agree with statements such as “I enjoy the feeling of having someone in my grasp” and “I enjoy the conquest [of sex].”<sup>258</sup> A third study found that being sexually driven by dominance is a predictor among college students of a willingness to engage in non-consensual sexual acts.<sup>259</sup>

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252. *Id.* at 642.

253. Marina Koren, *Telling the Story of the Stanford Rape Case*, THE ATLANTIC (June 6, 2016), <http://www.theatlantic.com/news/archive/2016/06/stanford-sexual-assault-letters/485837> [<https://perma.cc/4CRA-FN8N>].

254. *Id.*

255. *Court Statement of Stanford Rape Victim*, N.Y. TIMES (June 8, 2016), <http://www.nytimes.com/interactive/2016/06/08/us/stanford-rape-victim-statement.html> [<https://perma.cc/94BK-QBQP>].

256. All fifty states, the District of Columbia, and the five principal American territories have enacted sex offender registration statutes, which require offenders to register or face criminal penalties. Many have instituted residency and work restrictions, forcing offenders to live under highways and in other remote areas. Indefinite civil commitment of sex offenders has been upheld as constitutional by the Supreme Court. Sentences for sex crimes are also longer in the United States. The average time served for rape is sixty months in the United States, compared to thirty-four months on average in our peer countries. There is a strong argument that our hyper-punitive response to sex offenders is not only ineffective, but also counterproductive. Smith, *supra* note 247, at 260–61.

257. Anderson, *supra* note 228, at 642.

258. *Id.*

259. *Id.* at 643.

Being sexually driven by dominance is likely also a red flag for a future act of violence. Individuals who are sexually driven by dominance are clearly “overconformists to a particular normative construction of masculinity.”<sup>260</sup> And, as discussed above, subscribers to a hegemonic construction of masculinity see violence as a justified response not only to women who affront them, but also to members of a society they perceive as emasculating them. However, many perpetrators of non-consensual penetration committed without the use of force are convicted of misdemeanors, crimes which have no consequences for gun ownership.<sup>261</sup> It follows that legislators should correct for this loophole by expanding the Lautenberg Amendment to prohibit perpetrators of non-consensual penetration committed without the use of force, whether convicted of misdemeanors or felonies, from possessing guns.

#### IV.

##### DISRUPTING THE LINK BETWEEN MASCULINITY AND VIOLENCE

Expanding the Lautenberg Amendment to apply to those convicted of misdemeanor stalking and sexual assault would constitute an important step in the fight against mass shootings. However, non-legal actors such as parents and educators are uniquely situated to target a root cause of mass shootings: the narrow and dangerous conception of what it is to “be a man” in the United States. An in-depth exploration of this issue is beyond the scope of this Note, but in its place, I briefly look to initiatives launched in Mexico and the United States as examples of how non-legal actors could go about disrupting the link between masculinity and violence.

Machismo, defined as a “strong sense of masculine pride,” an “exaggerated masculinity,” or “an exaggerated or exhilarating sense of power or strength,” is in many ways the Mexican analog of the hegemonic masculinity seen in the United States.<sup>262</sup> Machismo has long been widespread in certain sectors and practices of Mexican society, reflected in television shows, movies, work settings, families, and romantic relationships.<sup>263</sup> However, soaring rates of violence against women, and a strengthening women’s rights movement, have forced Mexicans to begin to address the harms of machismo.<sup>264</sup> This process has reached the highest offices in the land. For example, on International Women’s Day in 2017, President Enrique Peña Nieto called on Mexico to “launch a frontal

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260. Kimmel and Mahler, *supra* note 133, at 1440.

261. Corbin, *supra* note 157.

262. *Machismo*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/machismo> [<https://perma.cc/5FEV-PE5A>].

263. Paulina Villegas, *Where Machismo Is Entrenched, Focus Moves to the Trenches*, N.Y. TIMES (April 23, 2017), [https://www.nytimes.com/2017/04/23/world/americas/where-machismo-is-entrenched-focus-moves-to-the-trenches.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&\\_r=0](https://www.nytimes.com/2017/04/23/world/americas/where-machismo-is-entrenched-focus-moves-to-the-trenches.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=0) [<https://perma.cc/C8MD-4DJJ>].

264. *Id.*

assault against all expressions of machismo.”<sup>265</sup> Gendes, a research and advocacy group in Mexico City, has taken up the cause. Gendes aims to improve male behavior through counseling, education, and public awareness campaigns.<sup>266</sup> It provides men with free therapy three times a week, which seeks to question and address the cultural beliefs that lie at the heart of machismo.<sup>267</sup> Mexican companies are also weighing in. For example, Tecate, a beer brand, recently started a television advertising campaign featuring a woman covered in bruises.<sup>268</sup> “A man is defined by how he treats a woman,” a voice-over says.<sup>269</sup> “If you don’t respect women, Tecate is not for you.”<sup>270</sup>

In contrast, the United States has yet to see a “frontal assault” launched on expressions of hegemonic masculinity. Even among commentators seeking to raise awareness of the dangers of hegemonic masculinity, expectations are low. Indeed, Stephen Marche comments that he is “not asking for male consciousness-raising groups; let’s start with a basic understanding that masculinity is a subject worth thinking about. That alone would be an immense step forward.”<sup>271</sup>

Given this reality, is it unsurprising that many conversations aimed at dismantling hegemonic masculine norms in the United States are taking place in the private sphere. In an article titled “How to Raise a Feminist Son,” Claire Cain Miller, a correspondent for the *New York Times*, gives instructions to parents on how to go about this task.<sup>272</sup> Miller’s suggestions include “let[ting] him cry,” “giv[ing] him role models,” “teach[ing] him to take care of others,” “encourag[ing] friendship with girls,” “teach[ing] ‘no means no,’” “speak[ing] up when others are intolerant,” “never us[ing] ‘girl’ as an insult,” and reading about girls and women.<sup>273</sup> Others have also honed in on the importance of encouraging boys to have cross-sex friendships and teaching them to handle

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265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. Stephen Marche, *The Unexamined Brutality of the Male Libido*, N.Y. TIMES (Nov. 25, 2017), <https://www.nytimes.com/2017/11/25/opinion/sunday/harassment-men-libido-masculinity.html> [<https://perma.cc/5GT4-SK9Y>].

272. Claire Cain Miller, *How to Raise a Feminist Son*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/upshot/how-to-raise-a-feminist-son.html> [<https://perma.cc/BL44-MBEY>].

273. *Id.*

rejection with grace,<sup>274</sup> as well as letting boys experience their emotions and exposing them to a method of communicating feelings.<sup>275</sup>

Ruminations about hegemonic masculinity have also reached college campuses. In 2013, the Center for the Study of Men and Masculinities was established at Stony Brook University, part of the State University of New York.<sup>276</sup> The center offers the first master's degree program in "masculinities studies," through which students examine what it means to "be a man" today.<sup>277</sup> In 2015, the center hosted the first International Conference on Men and Masculinities, where topics of discussion included fatherhood, male friendships, and balancing work and family life.<sup>278</sup>

Turning to the issue of counseling services, only a handful of universities offer spaces for all men to explore their "shared struggles."<sup>279</sup> However, the effort to engage males for gender equality has spread to middle schools as well. For example, a weekly lunch time boys' group at the Sheridan School in Washington D.C. is one of several programs nationwide which are teaching boys to question gender roles.<sup>280</sup>

Lastly, due to their potential to shape public discourse, media and the arts are important frontiers in the battle against hegemonic masculinity, and several artists and cultural commentators are joining the fight. The Good Men Project, now a media company, was founded in 2009 by Tom Matlack, who set out to collect stories about the defining moments in men's lives.<sup>281</sup> The stories became a book, a film, and eventually a website, which provides its readers a space in which to have conversations about manhood.<sup>282</sup> "The Mask You Live In," a documentary by the Representation Project, a nonprofit organization which uses film and media as catalysts for social change, has a similar mission.<sup>283</sup> The documentary tracks boys and young men as they struggle to negotiate America's

274. Moises Velasquez-Manoff, *Real Men Get Rejected, Too*, N.Y. TIMES (Feb. 24, 2018), <https://www.nytimes.com/2018/02/24/opinion/sunday/real-men-masculinity-rejected.html> [<https://perma.cc/V6LP-XMRK>].

275. *Id.*; Andrew Reiner, *Talking to Boys the Way We Talk to Girls*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/well/family/talking-to-boys-the-way-we-talk-to-girls.html> [<https://perma.cc/CV8F-EBPE>].

276. Andrew Reiner, *Teaching Men to Be Emotionally Honest*, N.Y. TIMES (April 4, 2016), <https://www.nytimes.com/2016/04/10/education/edlife/teaching-men-to-be-emotionally-honest.html> [<https://perma.cc/6D3L-97ZQ>].

277. Jessica Bennett, *A Master's Degree in . . . Masculinity?*, N.Y. TIMES (August 8, 2015), <https://www.nytimes.com/2015/08/09/fashion/masculinities-studies-stonybrook-michael-kimmel.html> [<https://perma.cc/WL7C-YUYD>].

278. Reiner, *supra* note 276.

279. *Id.*

280. Andrew Reiner, *Boy Talk: Breaking Masculine Stereotypes*, N.Y. TIMES (October 24, 2018), <https://www.nytimes.com/2018/10/24/well/family/boy-talk-breaking-masculine-stereotypes.html> [<https://perma.cc/8HKV-UNB6>].

281. GOOD MEN PROJECT, <https://goodmenproject.com/about> [<https://perma.cc/E55M-MB2T>].

282. *Id.*

283. THE MASK YOU LIVE IN (Representation Project 2015).

narrow conception of what it is to “be a man.”<sup>284</sup> Finally, the third PhotoVogue Festival, which ran in November 2018, featured an exhibition titled “All That Man Is—Fashion and Masculinity Now.”<sup>285</sup> Alessia Glaviano explained the decision to put on an exhibition on masculinity as follows. “This idea that if you’re a man you cannot be who you actually are creates a huge problem for young boys growing up. It’s about time people start to question it.”<sup>286</sup>

#### CONCLUSION

This Note has argued that the Lautenberg Amendment should be expanded to apply to those convicted of misdemeanor crimes of stalking and sexual assault. Acts of violence against women such as domestic violence, stalking, and sexual assault suggest that perpetrators conform to the norms of hegemonic masculinity, the keystone of a patriarchal system that marginalizes and subordinates women. Subscribers to this construction of masculinity, however, see violence as a justified response not only to women who affront them, but also to members of a society they perceive as emasculating them. Therefore, acts of violence against women, including stalking and sexual assault, should be treated by the law as red flags for larger-scale acts of violence, and proof of their commission should prevent the perpetrators from acquiring guns.

While expanding the Lautenberg Amendment in this way would constitute an important step in the fight against mass shootings, so much more remains to be done. Take the case of Cheryl Mascareñas. In 2016, Ms. Mascareñas began dating George Daniel Wechsler.<sup>287</sup> The couple dated briefly before Ms. Mascareñas broke things off.<sup>288</sup> In December 2016, Ms. Mascareñas and her three children returned home to find Mr. Wechsler waiting for them with a gun.<sup>289</sup> Ms. Mascareñas survived.<sup>290</sup> Her children did not.<sup>291</sup> Soon after, it was revealed that Mr. Wechsler had pleaded guilty to misdemeanor stalking and assault of a previous girlfriend.<sup>292</sup> Yet because he was neither married to the woman, nor had children with her, he slipped through what is known as the “boyfriend loophole” in the Lautenberg Amendment’s protections.

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284. *The Mask You Live In: About the Film*, REPRESENTATION PROJECT, <http://therepresentationproject.org/film/the-mask-you-live-in/about-the-film> [https://perma.cc/E8KU-Z36J].

285. *Challenging Visual Stereotypes of Masculinity*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/lens/challenging-visual-stereotypes-of-masculinity.html> [https://perma.cc/485H-5UB5].

286. *Id.*

287. *Boyfriends Can Kill Too*, N.Y. TIMES: THE HOME FRONT, PT. 2 (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/opinion/boyfriend-loophole-guns.html> [https://perma.cc/9MQ5-23L2].

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*



Tragedies like that which befell Ms. Mascareñas and her children can be avoided if Congress expands the Lautenberg Amendment to apply to dating partners and family members beyond spouses and children.<sup>293</sup> Deficiencies in the national background check system, like the one which enabled the Sutherland Springs shooting, also need to be fixed. Finally, legislators are not the only actors with a role to play in the fight against mass shootings. Only by disrupting the link between masculinity and violence can a truly comprehensive effort to prevent mass shootings be launched.

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293. Senator Amy Klobuchar has introduced legislation that would close the “boyfriend loophole,” and would also prevent those convicted of misdemeanor stalking from possessing guns: precisely what this Note advocates. *Id.*

