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THE JOURNAL OF
LAW, MEDICINE & ETHICS
SPECIAL SUPPLEMENT TO VOLUME 48:4 • WINTER 2020

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THE JOURNAL OF
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C O N T E N T S

SPECIAL SUPPLEMENT TO VOLUME 48:4 • WINTER 2020

Symposium Articles

SYMPOSIUM

**Gun Violence in
America: An
Interdisciplinary
Examination**

Guest Edited by
Ian Ayres,
Abbe R. Gluck, and
Tracey L. Meares

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*Letter from
the Editor*

Cover image ©Getty

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Introduction

*Ian Ayres, Abbe R. Gluck, and
Tracey L. Meares, and Caroline Nobo
Sarnoff*

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Why Regulate Guns?

Reva Siegel and Joseph Blocher

Courts reviewing gun laws that burden Second Amendment rights ask how effectively the laws serve public safety — yet typically discuss public safety narrowly, without considering the many dimensions of that interest gun laws serve. “Public safety” is a social good: it includes the public’s interest in physical safety as a good in itself, and as a foundation for community and for the exercise of constitutional liberties. Gun laws protect bodies from bullets — and Americans’ freedom and confidence to participate in every domain of our shared life, whether to attend school, to shop, to listen to a concert, to gather for prayer, or to assemble in peaceable debate. Courts must enforce the Second Amendment in ways that respect the public health and constitutional reasons a democracy seeks to protect public safety. Lawyers and citizen advocates can help, by creating a richer record of their reasons in seeking to enact laws regulating guns.

This inquiry is urgent at a time when the Supreme Court’s new conservative majority may expand restrictions on gun laws beyond the right to keep arms for self-defense in the home first recognized in *District of Columbia v. Heller* in 2008.

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**The Legal and Empirical Case for
Firearm Purchaser Licensing**

*Hannah Abelow, Cassandra Crifasi, and
Daniel Webster*

This article argues that state government actors concerned about gun violence prevention should prioritize enactment of robust firearm purchaser regimes at the state level. First, the article outlines the empirical evidence base for purchaser licensing. Then, the article describes how state governments can design this policy. Next, the article assesses the likelihood that purchaser licensing legislation will continue to be upheld by federal courts. Finally, the article addresses the implications of this policy, aimed at

curbing gun deaths, for equally important racial justice priorities. Taken together, these various considerations indicate that purchaser licensing policies are among the most effective firearm-focused laws state governments can enact to reduce gun deaths within the existing federal legislative and legal frameworks.

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**Gun Regulation Exceptionalism and
Adolescent Violence: A Comparison
to Tobacco**

Catherine Camp

This article compares the landscape of tobacco regulations to the landscape of gun regulations, with a focus on regulations that target youth. This article argues that guns are significantly less regulated compared to tobacco, despite the frequency with which each product causes significant harm to both self and other.

Many of the specific ways tobacco is regulated can be applied analogously to firearms while plausibly surviving potential Second Amendment challenges. This article compares the regulatory landscape of tobacco and firearms across six categories: (a) minimum age for purchase, (b) sale by unlicensed individuals, (c) taxation, (d) advertising, (e) graphic warning labels, and (f) zoning.

At one time, tobacco was as central — or more so — to American culture as guns are today. However, many decades of public health advocacy led to historic tobacco regulations. Tobacco’s regulatory history provides a valuable blueprint for gun regulation, despite Constitutional differences.

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The Firearms Data Gap

*Allison Durkin, Brandon Willmore,
Caroline Nobo Sarnoff, and David
Hemenway*

The firearms data infrastructure in the United States is severely limited in scope and fragmented in nature. Improved data systems are needed in order to address gun violence and promote productive conversation about gun policy. In the absence of federal leadership in firearms data systems improvement, motivated states may take proactive steps to stitch gaps in data systems. We propose that states evaluate the gaps in their systems, expand data collection, and improve data presentation and availability.

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**Implementing Checklists to Improve
Police Responses to Co-Victims of Gun
Violence**

Samuel A. Kuhn and Tracey L. Meares

This qualitative study identifies police interactions with gun violence co-victims as a crucial, overlooked component of police unresponsiveness, particularly in minority communities where perceptions of police illegitimacy and legal estrangement are relatively high. Gun violence co-victims in three cities participated in online surveys, in which they described pervasive disregard by police in the aftermath of their loved ones' shooting victimization. We build on the checklist model that has improved public safety outcomes in other complex, high-intensity professional contexts to propose a checklist for police detectives to follow in the aftermath of gun violence. To build the checklist, we also reviewed the general orders of five police departments to better understand what guidance, if any, is currently given to police personnel regarding how they should interact with gun violence victims.

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**Enhancing Community Safety through
Interagency Collaboration: Lessons from
Connecticut's Project Longevity**

*Camila Gripp, Chandini Jha, and
Paige E. Vaughn*

Group Violence Interventions (GVIs) combine a focused deterrence law enforcement approach with community mobilization and social services. The current study qualitatively examines Project Longevity, Connecticut's largest GVI initiative, to contribute to the limited literature on implementation of gun violence reduction strategies. Relying on interviews with 24 of Project Longevity law enforcement and non-law enforcement partners, we explore the establishment of interagency collaboration, which was viewed by study participants as the most pressing implementation challenge of Project Longevity. Our case study results offer important lessons to practitioners responsible for implementing GVI strategies.

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**Physicians on the Frontlines:
Understanding the Lived Experience of
Physicians Working in Communities That
Experienced a Mass Casualty Shooting**

*Kathleen M. O'Neill, Blake N. Shultz,
Carolyn T. Lye, Megan L. Ranney, Gail
D'Onofrio, and Edouard Coupet, Jr.*

This qualitative study describes the lived experience of physicians who work in communities that have experienced a public mass shooting. Semi-structured interviews were conducted with seventeen physicians involved in eight separate mass casualty shooting incidents in the United States. Four major themes emerged from constant comparative analysis: (1) The psychological toll on physicians: "I wonder if I'm broken"; (2) the importance of and need for mass casualty shooting preparedness: "[We need to] recognize this as a public health concern and train physicians to manage it"; (3) massive media

attention: "The media onslaught was unbelievable"; and (4) commitment to advocacy for a public health approach to firearm violence: "I want to do whatever I can to prevent some of these terrible events."

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**Emergency Department Visits for
Firearm-Related Injuries among Youth
in the United States, 2006–2015**

*Victor Lee, Catherine Camp, Vikram
Jairam, Henry S. Park, and James B. Yu*

Firearm injuries are a significant public health problem. Prior studies have analyzed firearm death data or adult firearm injury data, but few studies have analyzed firearm injury data specifically among youth. To inform the current debate surrounding gun policy in the United States, this study aims to provide an estimate of the immense burden of youth firearm injury and its associated risk factors. Therefore, we performed a descriptive analysis of the Nationwide Emergency Department Sample (NEDS), the largest all-payer emergency department database in the United States, from January 2006 to September 2015. All patients age < 21 who presented with any diagnosis of firearm-related injuries were included.

There were an estimated 198,839 incidents of firearm-related emergency department visits for patients age < 21 from 2006 through 2015. After presenting to the ED, an estimated 11,909 cases resulted in death. The population adjusted rate of firearm-related emergency department visits was highest in the South and Midwest. This study demonstrates the significant burden of firearm injury among youth. Having a reliable estimate of the number of children harmed by firearms each year is a critical tool for policymakers — and may make common-sense gun safety measures more politically possible.

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**The Walmart Effect: Testing Private
Interventions to Reduce Gun Suicide**

*Ian Ayres, Zachary Shelley, and
Fredrick E. Vars*

This article tests the impact of Walmart's corporate decisions to end the sale of handguns at its stores in 1994 and to discontinue the sale of all firearms at approximately 59% of its stores in 2006 before resuming firearms sales at some of those stores in 2011. Using a difference-in-differences framework, we find that that from 1994 to 2005 counties with Walmarts robustly experienced a reduction in the suicide rate and experienced no change in the homicide rate. These models suggest that Walmart's policy change caused a 3.3 to 7.5% reduction in the suicide rate within affected counties, which represents an estimated 5,104 to 11,970 lives saved over the studied period (425–998 per year). In contrast, Walmart's 2006 and 2011 decisions to discontinue and subsequently resume the sale of rifles and shotguns in many of its stores was not associated with a robustly measured effect on homicide or suicide rates. We do find evidence that Walmart's 2006 decision to reduce the number of its stores that sold firearms caused a statistically significant reduction in the suicide rate for counties in which Walmart did not subsequently resume firearms sales.

83 States' Rights, Gun Violence Litigation, and Tort Immunity

*Hilary J. Higgins, Jonathan E. Lowy, and
Andrew J. Rising*

The devastating toll of gun violence has given rise to hundreds of lawsuits seeking justice on behalf of victims and their families. A significant number of challenges against gun companies, however, are blocked by courts' broad reading of the Protection of Lawful Commerce in Arms Act (PLCAA) — a federal statute often interpreted to shield the gun industry from civil liability. This article reexamines PLCAA in light of the Supreme Court's recent federalism caselaw, which counsels courts to narrowly construe federal laws that could otherwise upset the balance of power between states and the federal government. Since PLCAA infringes on traditional areas of state authority, the Supreme Court's federalism jurisprudence requires lower courts to interpret PLCAA narrowly, to not bar states from imposing negligence, nuisance, product liability, or other common law liability on gun companies. Reading PLCAA in line with federalism principles would preserve states' traditional authority over their civil justice laws, and enable gun violence victims, and their families, to hold gun companies responsible for wrongdoing.

90 Gun Violence in Court

*Abbe R. Gluck, Alexander Nabavi-Noori,
and Susan Wang*

Litigation cannot solve a public health crisis. But litigation can be an effective complementary tool to regulation by increasing the salience of a public health issue, eliciting closely guarded information to move public opinion, and prompting legislative action. From tobacco to opioids, litigants have successfully turned to courts for monetary relief, to initiate systemic change, and to hold industry accountable.

For years, litigators have been trying to push firearm suits into their own litigation moment. But litigation against the gun industry poses special challenges. Not only has the regulatory regime failed to prevent a public safety hazard, Congress has consistently underfunded and understaffed the relevant regulatory actors. And in 2005 it legislatively immunized the gun industry from suit with the Protection of Lawful Commerce in Arms Act (PLCAA).

This paper surveys the field of litigation in response to gun violence, tracking the limited successes of victims and stakeholders suing the gun industry. We find that victories remain confined to individual actors and unlike high-impact public litigations in other areas, aggregate class actions and major public litigation led by state attorneys general are noticeably absent in the firearm context.

98 Regulating 3D-Printed Guns Post- Heller: Why Two Steps Are Better Than One

Thaddeus Talbot and Adam Skaggs

This article describes why a constitutional test that relies exclusively on history and tradition for deciding modern firearm regulations is woefully inadequate when applied to modern technologies. It explains the unique advancements in

firearm technology — specifically, ghost guns — that challenge the viability of a purely historical test, even if legal scholars or judges attempt to reason by analogy. This article argues that the prevailing, two-step approach, which incorporates both history and tradition, and requires a judicial examination of the purposes and methods supporting a challenged firearm regulation, should apply nationwide. That a dissenting faction of conservative judges seeks to ignore the prevailing approach presents a potentially dangerous path for Second Amendment jurisprudence. This article draws from certain historical gun laws to illustrate the difficult legwork that analogies must do under a purely historical test. It uses the advent of ghost guns as a case study to offer guidance for judges in their rulemaking practices regarding Second Amendment cases.

105 Second Amendment Sanctuaries: A Legally Dubious Protest Movement

*Erica Turret, Chelsea Parsons, and
Adam Skaggs*

This article assesses the origins and spread of the Second Amendment sanctuary movement in which localities pass ordinances or resolutions that declare their jurisdiction's view that proposed or enacted state (or federal) gun safety laws are unconstitutional and therefore, local officials will not implement or enforce them. While it is important to assess Second Amendment sanctuaries from a legal perspective, it is equally as important to understand them in the context of a broader protest movement against any efforts to strengthen gun laws. As the gun violence prevention movement has gained strength across the United States, particularly at the state level, gun rights enthusiasts have turned to Second Amendment sanctuaries in order to create a counter narrative to the increasing political power of gun safety. By passing these ordinances or resolutions, local officials legitimize and fuel Second Amendment absolutism which poses real risks to public safety and democracy.

112 True Threats, Self-Defense, and the Second Amendment

Joseph Blocher and Bardia Vaseghi

Does the Second Amendment protect those who threaten others by negligently or recklessly wielding firearms? What line separates constitutionally legitimate gun displays from threatening activities that can be legally proscribed? This article finds guidance in the First Amendment doctrine of true threats, which permits punishment of "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individual." The Second Amendment, like the First, should not be read to protect those who threaten unlawful violence. And to the degree that the constitution requires a culpable mental state (*mens rea*) in such circumstances, the appropriate standard should be recklessness.

Online Articles

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COVID-19 Emergency Restrictions on Firearms

Samuel A. Kuhn

This article examines emergency restrictions imposed by state-level public officials on firearms during the COVID-19 pandemic. It surveys the litigation challenging each of the relatively few restrictions that were imposed, considers when and whether courts should apply the deferential *Jacobson* standard, the *Heller* Second Amendment analysis, or both, and explores the possibility that the unsettled nature of Second Amendment jurisprudence makes it likely that challenges to emergency firearms restrictions could result in dramatic developments in what the Second Amendment protects.

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A Double-Filter Provision for Expanded Red Flag Laws: A Proposal for Balancing Rights and Risks in Preventing Gun Violence

Gabriel A. Delaney and Jacob D. Charles

In response to the continued expansion of “red flag” laws allowing broader classes of people to petition a court for the removal of firearms from individuals who exhibit dangerous conduct, this paper argues that state laws should adopt a double-filter provision that balances individual rights and government public safety interests. The main component of such a provision is a special statutory category — “reporting party” — that enables a broader social network, such as co-workers or school administrators, to request that a law enforcement officer file a petition for an Extreme Risk Protection Order (ERPO). A double-filter provision would not give reporting parties a right to file a court petition directly. Instead, parties would file a request for petition with law enforcement officers (first filter), who must seek an ERPO from the court if they find the reporting party’s information credible. That information is then transmitted to the court (second filter) as a sworn affidavit of the reporting party. The goal is to facilitate a balanced policy model that (1) widens the reporting circle in order to feed more potentially life-saving information into the system, (2) mitigates the risk of erroneous deprivation of constitutionally protected due process and Second Amendment rights.

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How the Guardianship System Can Help Address Gun Violence

Nina A. Kohn

This article shows how state guardianship law can provide a mechanism for courts to reduce gun violence by removing the right to possess firearms from individuals found, after hearing and due process, to be incapable of safely possessing them. It explores how this often overlooked body of law not only complements extreme risk protection orders where they exist, but can also be used to accomplish a portion of what such orders are designed to do in states that have not authorized them. It concludes by suggesting some modest adjustments to guardianship law and practice that would help ensure that guardianship systems interventions in this arena are fair and effective.

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Mental Illness and Gun Violence: Research and Policy Options

Ronald S. Honberg

This article provides an overview of current knowledge about the relationship between mental illness, violence, homicides, and suicides, with a view towards crafting sensible public policy options for reducing gun violence towards self or others. With this knowledge as a backdrop, the limitations of the federal National Instant Background Check System (NICS) as both over-inclusive and under-inclusive in identifying people with mental illness who pose potential risks are discussed. Finally, the article describes emerging approaches for identifying and removing firearms from persons who pose potential risks of gun violence towards self or others, including Extreme Risk Protection Orders (“Red Flag Laws”) and other options.

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The “Rules of the Road”: Ethics, Firearms, and the Physician’s “Lane”

Blake N. Shultz, Benjamin Tolchin, and Katherine L. Kraschel

Physicians play a critical role in preventing and treating firearm injury, although the scope of that role remains contentious and lacks systematic definition. This piece aims to utilize the fundamental principles of medical ethics to present a framework for physician involvement in firearm violence. Physicians’ agency relationship with their patients creates ethical obligations grounded on three principles of medical ethics — patient autonomy, beneficence, and nonmaleficence. Taken together, they suggest that physicians ought to engage in clinical screening and treatment related to firearm violence. The principle of beneficence also applies more generally, but more weakly, to relations between physicians and society, creating nonobligatory moral ideals. Balanced against physicians’ primary obligations to patient agency relationships, general beneficence suggests that physicians may engage in public advocacy to address gun violence, although they are not ethically obligated to do so. A fourth foundational principle — justice — requires that clinicians attempt to ensure that the benefits and burdens of healthcare are distributed fairly.

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Understanding the Role of Law in Reducing Firearm Injury through Clinical Interventions

Blake N. Shultz, Carolyn T. Lye, Gail D'Onofrio, Abbe R. Gluck, Jonathan Miller, Katherine L. Kraschel, and Megan L. Ranney

Firearm injury in the United States is a public health crisis in which physicians are uniquely situated to intervene. However, their ability to mitigate harm is limited by a complex array of laws and regulations that shape their role in firearm injury prevention. This piece uses four clinical scenarios to illustrate how these laws and regulations impact physician practice, including patient counseling, injury reporting, and the use of court orders and involuntary holds. Unintended consequences on clinical practice of laws intended to reduce firearm injury are also discussed. Lessons drawn from these cases suggest that physicians require more nuanced education on this topic, and that policymakers should consult front-line healthcare providers when designing firearm policies.

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Your Liberty or Your Gun? A Survey of Psychiatrist Understanding of Mental Health Prohibitors

Cara Newlon, Ian Ayres, and Brian Barnett

This first-of-its-kind national survey of 485 psychiatrists in nine states and the District of Columbia (DC) finds substantial evidence of clinicians being uninformed, misinformed, and misinforming patients of their gun rights regarding involuntary commitments and voluntary inpatient admissions. A significant percentage of psychiatrists (36.9%) did not understand that an involuntary civil commitment triggered the loss of gun rights, and the majority of psychiatrists in states with prohibitors on voluntary admissions (57%) and emergency holds (56%) were unaware that patients would lose gun rights upon voluntary admission or temporary commitment. Moreover, the survey found evidence that psychiatrists may use gun rights to negotiate "voluntary" commitments with patients: 15.9% of respondents reported telling patients they could preserve their gun rights by permitting themselves to be voluntarily admitted for treatment, in lieu of being involuntarily committed. The results raise questions of whether psychiatrists obtained full informed consent for voluntary patient admissions, and suggest that some medical providers in states with voluntary admission prohibitor laws may unwittingly deprive their patients of a constitutional right. The study calls into question the fairness of state prohibitor laws as policy, and — at minimum — indicates an urgent need for psychiatrist training on their state gun laws.

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Investing in the Frontlines: Why Trusting and Supporting Communities of Color Will Help Address Gun Violence

Amber Goodwin and TJ Grayson

This article proposes potential strategies to address gun violence in communities of color while identifying the harms associated with a policing-centered, criminal legal approach. In addition to highlighting the dangers associated with the United States' current criminal legal tactics to reduce gun violence in these communities, the authors advocate for community-endorsed strategies that give those impacted by this issue the resources to take on gun violence in their own communities. Specifically, they identify, describe, and endorse a series of violence prevention programs that rely on community relations to detect and prevent incidents of gun violence and that view gun violence as a public health rather than criminal legal issue.

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A Behavioral Addiction Model of Revenge, Violence, and Gun Abuse

James Kimmel, Jr. and Michael Rowe

Data from multiple sources point to the desire for revenge in response to grievances or perceived injustices as a root cause of violence, including firearm violence. Neuroscience and behavioral studies are beginning to reveal that the desire for revenge in response to grievances activates the same neural reward-processing circuitry as that of substance addiction, suggesting that grievances trigger powerful cravings for revenge in anticipation of experiencing pleasure. Based on this evidence, the authors argue that a behavioral addiction framework may be appropriate for understanding and addressing violent behavior. Such an approach could yield significant benefits by leveraging scientific and public health-oriented drug abuse prevention and treatment strategies that target drug cravings to spur development of scientific and public-health-oriented "gun abuse" prevention and treatment strategies targeting the revenge cravings that lead to violence. An example of one such "motive control" strategy is discussed. Approaching revenge-seeking, violence, and gun abuse from the perspective of compulsion and addiction would have the added benefit of avoiding the stigmatization as violent of individuals with mental illness while also acknowledging the systemic, social, and cultural factors contributing to grievances that lead to violent acts.

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Rethinking the Medicalization of Violence: The Risks of a Behavioral Addiction Model

Catherine Feuille

This commentary responds to and problematizes Kimmel and Rowe's approach in "A Behavioral Addiction Model of Revenge, Violence, and Gun Abuse." By advancing an addiction model of retaliatory violence, Kimmel and Rowe medicalize behavior that is better understood as a social problem rooted in structural inequality. Reframing violence in terms of individual pathology abstracts it from social context and risks obscuring the need for structural change. For poor urban communities of color, who are disproportionately impacted by gun violence, medicalizing violent behavior may fuel further marginalization and oppression.

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Public Sector and Non-Profit Contributions to Drug Development: Historical Scope, Opportunities, and Challenges

A Symposium Guest Edited by Ameet Sarpatwari

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Guests with Guns: Public Support for “No Carry” Defaults on Private Land
Ian Ayres and Spurthi Jonnalagadda

A nationally representative survey of 2000 American adults shows broad support for prohibiting gun-possession on private land without the landowner's explicit permission. Many states have laws which permit concealed weapon carry unless explicitly prohibited by the landowner, but our survey suggests statistically-significant majorities would prefer “no carry” defaults with regard to homeowners, employers, and retailers. While respondents who are Republican, male, or gun owners are more likely to support “carry” defaults, we find that the majoritarian rejection of “carry” defaults does not tend to vary by region or state. However, our survey does find majority support for a default right to possess guns in rented property and on an employer's parking lot. Respondents across all contexts also report substantial ignorance or misinformation about the law. Landowners who don't know or mistakenly believe that concealed carry is, by default, prohibited on their land may be less able to protect themselves by explicitly prohibiting such third-party possession.

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Prevention of Firearm Injury through Policy and Law: The Social Ecological Model

Allison Durkin, Christopher Schenck, Yamini Narayan, Kate Nyhan, Kaveh Khoshnood, and Sten H. Vermund

Rates of firearm injury and mortality are far higher in the United States compared to other high-income nations. Patterns of firearm injury have complex causal pathways; different social contexts may be differentially affected by firearm legislation. In the context of the diversity of social, political, and legal approaches at the state level, we suggest the application of the social ecological model as a conceptual public health framework to guide future policy interventions in the U.S.