MONSTERS, MYTHS, AND MENTAL ILLNESS: A TWO-STEP APPROACH TO REDUCING GUN VIOLENCE IN THE UNITED STATES

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I. INTRODUCTION

The evening of May 23, 2014, had the beginnings of a normal Friday night for the students living in Isla Vista, California, a small community located adjacent to the University of California Santa Barbara. Instead, by ten o'clock that night seven students were confirmed dead, including the perpetrator,[1] in a gruesome scene that held the attention of the nation for months.[2] While the events in Isla Vista were indeed heinous, they unfortunately were not singular,[3] and the actions of Elliot Rodger re-fueled an intense national debate on the need for gun reform. Much of this debate

* Class of 2016, University of Southern California Gould School of Law; B.A. Global Studies 2012, University of California Santa Barbara. Thank you to the staff and editorial board of the Southern California Interdisciplinary Law Journal for all of their hard work on this Note, as well as to Professor Elyn Saks for her valuable input and guidance. To my family and friends, thank you for your unwavering support. Finally, I extend my deepest condolences to all of those who have been affected by gun violence in the United States.

1 BILL BROWN, SANTA BARBARA COUNTY SHERIFF'S OFFICE, ISLA VISTA MASS MURDER MAY 23, 2014: INVESTIGATIVE SUMMARY 28 (2015), http://www.sbsheriff.us/documents/ISLAVISTAINVESTIGATIVESUMMARY.pdf (describing the events leading up to the shooter's death, including using military time to detail when the events occurred. Following his killing of six people, Elliot Rodgers was found dead in his car from a self-inflicted gunshot wound at "21:36:38" hours, or around 9:36pm).

2 *See 2014 Isla Vista Killings*, WIKIPEDIA, http://en.wikipedia.org/wiki/2014_Isla_Vista_killings (last visited Nov. 8, 2015).

3 In recent years there have been several similarly disturbing shootings, many of them on or near school campuses. In 2012 Adam Lanza took his mother's gun and killed twenty-six people, including twenty children, at Sandy Hook Elementary School in Connecticut; in 2011 Jared Lee Loughner shot nineteen people in Tuscon, Arizona while attempting to assassinate U.S. Representative Gabrielle Giffords; and in 2007 Seung-Hui Cho walked onto the Virginia Tech campus with two semi-automatic handguns and shot a total of forty-nine people, killing thirty-two of them. Each of these shooters had been rumored to struggle with some form of mental illness. *See* CNN Library, *Connecticut Shooting Fast Facts*, CNN (Dec. 26, 2014, 5:08 PM), http://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts/index.html; *Jared Lee Loughner*, WIKIPEDIA, http://en.wikipedia.org/wiki/Jared_Lee_Loughner (last visited Nov. 8, 2015); *Seung-Hui Cho*, WIKIPEDIA, http://en.wikipedia.org/wiki/Seung-Hui_Cho (last visited Nov. 8, 2015).

has revolved around gun laws targeting the mentally ill.[4] Although Rodger was never formally diagnosed with mental illness, his parents have publicly stated that they tried to help their child through his "mental issues,"[5] and that he had been seeing a psychiatrist for most of his life.[6] Because of the recent intense publicity of shootings, such as the one in Isla Vista, many people have come to associate mental illness with this type of extreme violence and have demanded harsher gun control legislation aimed at keeping firearms out of the hands of the mentally ill.[7]

However, this general push for stricter gun control is likely to be ineffective, since the vast majority of the scientific community agrees that most individuals with mental illness are no more dangerous than the general population.[8] Thus, any proposed legislation that focuses solely on keeping guns out of the hands of persons with mental illness will likely not be effective at reducing gun violence. What is necessary instead is a shift in focus. While the majority of individuals with mental illness are not likely to be violent, studies have found that there is a small subgroup of individuals with mental illness that have a tendency to violence. [9] The link between mental illness and violence becomes stronger when certain other variables are present, most notably substance abuse and history of violence.[10] Thus, current federal and state laws need to be amended to target *dangerous* individuals with mental illness, as opposed to individuals with mental illness generally. This would not only make gun laws more effective at reducing violence, but it would also help change the public's current perception of mental illness and the stigma that is associated with it.

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4 *2014 Isla Vista Killings*, *supra* note 2.

5 Adam Nagourney et al., *Before Brief, Deadly Spree, Trouble Since Age 8*, N.Y. TIMES (June 1, 2014), http://www.nytimes.com/2014/06/02/us/elliot-rodger-killings-in- california-followed-years-of-withdrawal.html.

6 Holly Yan et al., *New Details Emerge about California Killer and His Victims*, CNN (May 27, 2014), http://www.cnn.com/2014/05/26/justice/ california- killing-spree/.

7 Jonathan M. Metzl, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 240 (2015) ("In the United States, popular and political discourse frequently focuses on the causal impact of mental illness in the aftermath of mass shootings.").

8 E. Fuller Torrey, *Violent Behavior by Individuals With Serious Mental Illness*, 45 HOSP. & COMMUNITY PSYCHIATRY 653, 658 (1994); U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. PUB. HEALTH SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 7 (1999) (stating that the overall likelihood of violence from people with mental disorders is low); COUNCIL ON PSYCHIATRY & LAW, AM. PSYCHIATRIC ASS'N, ACCESS TO FIREARMS BY PEOPLE WITH MENTAL ILLNESS 1 (2009) (stating that only 4–5 percent of all violent acts committed throughout the nation are committed by those with mental illness).

9 *E.g.*, Marie E. Rueve & Randon S. Welton, *Violence and Mental Illness*, 5 PSYCHIATRY 34, 36 (2008) ("Most patients with stable mental illness do not present an increased risk of violence."); Torrey, *supra* note 8, at 659 ("[V]iolent acts are committed by a small minority within the population of seriously mentally ill persons . . . .").

10 Eric B. Elbogen & Sally C. Johnson, *The Intricate Link Between Violence and Mental Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions*, 66 ARCHIVES GEN. PSYCHIATRY 152, 156–57 (2009); Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GEN. PSYCHIATRY 393, 399–400 (1998) (finding that the presence of substance abuse increased violence rates more in patients with mental illness).

Further, in order to substantially reduce gun violence it is also necessary to improve the current reporting method used by the states and federal government. In 1993, Congress passed the Brady Handgun Violence Prevention Act, which established a "national instant criminal background check."[11] The National Instant Criminal Background Check System ("NICS"), which was officially established in 1998, requires federally licensed firearms dealers to run an instant background check before the sale or transfer of any firearm or ammunition.[12] However, because of the principles of federalism, state submission of mental health records to the NICS is voluntary, and states have been slow to submit records.[13] In 2007, in an attempt to entice the states to submit their records, Congress passed the NICS Improvement Amendment Acts ("NIAA"), which provided certain financial incentives and penalties to states based on their submission numbers.[14] However, four years after the NIAA's passage, the Government Accountability Office published a study finding that "most states have made little or no progress in providing these records" to the NICS.[15] Thus, in order for the NICS to function properly, the federal government needs to provide stronger incentives for states to submit their records, along with harsher financial penalties for states that fail to do so. In addition, states need to pass legislation requiring that state agencies and courts submit the required mental health records to the NICS in a timely manner.

This approach, combined with a restructuring of current and proposed gun laws to focus on dangerousness, would work to reduce gun violence. These two steps are interdependent on one another; one will not be able to effect any real change on its own. Without a change in the focus of gun laws, the NICS will continue to be unable to identify some of the individuals who are most dangerous. Additionally, without improved accuracy of the NICS, any change in gun laws will fail to have any real effect because the individuals will not be in the NICS system. Thus, the two must work in tandem in order to reduce gun violence committed by individuals with mental illness in the United States.

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11 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. §§ 921–22 (2012)).

12 *National Instant Criminal Background Check System*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/nics (last visited Nov. 8, 2015).

13 U.S. GOV'T ACCOUNTABILITY OFFICE, GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS 7 (2012) [hereinafter GAO]. *See* Printz v. United States, 521 U.S. 898, 926 (1997) (analyzing the principles of federalism to conclude that "[the] Federal Government . . . may not compel the States to administer a federal regulatory program").

14 NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (codified as amended at 18 U.S.C. § 922 (2012)).

15 GAO, *supra* note 13, at 9.

II. DANGEROUSNESS

A. THE FEDERAL GUN CONTROL ACT OF 1968

1. Definition

In order to understand the ineffectiveness of current gun laws in the United States, one must start with the Federal Gun Control Act of 1968 (The Act).[16] The Act makes it unlawful for any person who "has been adjudicated as mentally defective or has been committed to a mental institution" to possess, transport, or receive "any firearm or ammunition which has been shipped or transported in interstate . . . commerce."[17] The first problem with the statute is that on its face the terms are very vague. For example, it is unclear what is required for a person to be considered "mentally defective," or whether "committed to any mental institution" includes mandatory outpatient services or emergency hospitalizations. The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) attempted to clarify what the terms mean in § 478.11 of the Code of Federal Regulations.[18] The regulation provides that the term "adjudicated as a mental defective" requires:

> (a) A determination by a court, board, commission, or other lawful authority as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease:
> (1) Is a danger to himself or to others; or
> (2) Lacks the mental capacity to contract or manage his own affairs.[19]

The term includes "a finding of insanity by a court in a criminal case" and individuals who have been determined incompetent to stand trial.[20] The regulation also sheds some light on what it means to be "committed to a mental institution"; the term refers to "a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority."[21] It applies to those who are involuntarily committed for "mental defectiveness or mental illness," and also includes commitments for other reasons, such as drug use.[22]

In January 2014, the Department of Justice proposed that the ATF amend § 478.11 in order to further clarify the terms found in § 922(g)(4).[23] The proposed amendment explains that the term "adjudicated as a mental defective" includes individuals who have been "found incompetent to stand

16 18 U.S.C. § 922 (2012).
17 18 U.S.C. § 922(g)(4) (2012).
18 27 C.F.R. § 478.11 (2014).
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 Amended Definition of "Adjudicated as a Mental Defective" and "Committed to a Mental Institution," 79 Fed. Reg. 774, 774 (proposed Jan. 7, 2014).

trial or not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity."[24] While the Department of Justice acknowledged that the term "mental defective" is "outdated," it seems to do so only regarding the offensive connotation of the term.[25] Unfortunately, it does not seem to acknowledge that the term is also "outdated" in the sense that it inherently implies that those who are "incompetent" by "mental disease or defect" are dangerous. Thus, while clarification of the terms found in the Gun Control Act of 1968 is necessary, these recently proposed rules illustrate the continued cluelessness of lawmakers regarding accurate predictors of future violence, and what sort of change is necessary in order to pass effective gun control legislation.

If you are found to have been "adjudicated as a mental defective" or "committed to a mental institution" under § 922(g)(4), you are disallowed from ever purchasing, possessing, or selling a firearm in interstate commerce.[26] If you would like to restore your right to bear arms, under federal law your only option is to apply for relief from the Attorney General.[27] However, any action on relief petitions has been prohibited by Congress since 1992.[28] Thus, if you qualify for firearm prohibition under § 922(g)(4), you are effectively permanently banned from possessing a firearm. The penalty for violating the federal law is imprisonment for up to five years, a fine, or both.[29]

2. Judicial Treatment

One of the first examinations of the legislative intent behind the federal law came in 1974, when the Supreme Court observed that "the principal purpose of the federal gun control legislation . . . was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'"[30] Justice Blackmun, writing for the Court, went on to note that "there also can be no doubt of Congress' intention to deprive the juvenile, the mentally incompetent, the criminal, and the fugitive of the use of firearms."[31] To prove this point, the opinion quoted the House Manager at the time of the bill's passage, who stated, "No one can dispute the need to prevent drug addicts, mental incompetents, [and] persons with a history of mental disturbances . . . from buying, owning, or possessing firearms. This bill

24 *Id.*

25 *Id.*

26 18 U.S.C. § 922(g) (2012).

27 18 U.S.C. § 925(c) (2012).

28 United States v. Rehlander, 666 F.3d 45, 49 (1st Cir. 2012) (citing Logan v. United States, 552 U.S. 23, 28 n.1 (2007); United States v. Booker, 570 F. Supp. 2d 161, 164 n.2 (D. Me. 2008)).

29 18 U.S.C. § 924(a)(4) (2012).

30 Huddleston v. United States, 415 U.S. 814, 824 (1974) (examining whether § 922 applied when redeeming firearms from a registered pawnbroker).

31 *Id.* at 827.

seeks to *maximize the possibility* of keeping firearms out of the hands of such persons."[32]

The following decades saw more examination of the legislative purpose behind the Act, both by the Supreme Court and in the circuit courts. By 1983, the Supreme Court had "repeatedly observed" that the statute's "plain language" and legislative history make it clear that "Congress sought to rule broadly" while "reaching far and doing so intentionally."[33] Keeping this language in mind, the First Circuit went on to hold that the Congressional Record indicates that the statute was intended to keep firearms out of the hands of "mentally unstable" or "irresponsible individuals."[34] The First Circuit also noted that it was not Congress' intention to prohibit firearms from individuals who had already proved their dangerousness, but instead it intended to preemptively keep firearms away from groups it saw as having a certain risk factor.[35]

In 1994, the Second Circuit interpreted the federal statute to examine whether a person who had been involuntarily hospitalized without a judicial order or formal commitment process had been "committed to a mental institution" under § 922(g)(4).[36] The court reasoned that the state law the individual had been hospitalized under, which allowed for "the involuntary confinement of dangerous individuals who cannot survive in the community," was in line with the federal statute's broad purpose, and thus a formal judicial order was not necessary in order to be "committed to a mental institution" under § 922(g)(4).[37] Similarly, in 2006 the Sixth Circuit determined that Congress did not intend that all "commitments" under the law needed to come from official judicial orders.[38] At issue in *United States v. Vertz* was whether Vertz, an individual who had been involuntarily admitted to a psychiatric hospital for a five-day stay, had been "committed" pursuant to § 922(g)(4).[39] The Sixth Circuit concluded that Vertz's five-day involuntary commitment counted as a "commitment" under federal law, despite the fact that there was no official judicial order or

32 *Id.* at 828 (emphasis added) (citing 114 Cong. Rec. 21784 (1968)).

33 Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112, 116 (1983), *superseded by statute*, Firearm Owners' Protection Act of 1986, 100 Stat. 49, *as recognized in* Logan v. United States, 552 U.S. 23, 27–28 (2007).

34 United States v. Chamberlain, 159 F.3d 656, 660 (1998), *overruled by* United States v. Rehlander, 666 F.3d 45 (1st Cir. 2012). *See* H.R. 17735, 90th Cong., (2d Sess. 1968), 114 CONG. REC. 21780, 21791, 21832, and 22270 (1968).

35 *See Chamberlain*, 159 F.3d at 660 (stating that "Congress considered the mere risk or potential for violence or irresponsible use sufficient reason to prohibit certain categories of persons from possessing firearms . . . . Congress' intent . . . was to keep firearms out of the hands of presumptively risky people.").

36 United States v. Waters, 23 F.3d 29, 31 (2d Cir. 1994). The question of whether an individual has been "committed" pursuant to § 922(g)(4) is a question of federal law, but courts generally look to state law to help resolve the issue, since commitments are usually made under state law. United States v. Vertz, 40 Fed. App'x. 69, 72–73 (6th Cir. 2002).

37 *Waters*, 23 F.3d at 35–36.

38 *Vertz*, 40 F. App'x. at 75.

39 *Id.* at 71–72.

hearing.[40] The court supported its reasoning by making several references to the federal statute's "broad protective purpose."[41]

This trend of broad application in the circuits continued until 2012, when the First Circuit overruled its previous decision in *United States v. Chamberlain*,[42] and held that "emergency" involuntary hospitalizations authorized by Maine state law did not qualify as a "commitment" under § 922(g)(4).[43] This change in attitude was attributed to the Supreme Court's recent take on Second Amendment rights in *District of Columbia v. Heller*.[44] In *Heller,* the Court examined the language and history of the Second Amendment and declared that it undoubtedly "conferred an individual right to keep and bear arms."[45] However, the Supreme Court also noted that this individual right is not an unlimited one, assuring that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[46]

In choosing to overrule its previous decision, the First Circuit acknowledged that *Heller* added a "constitutional component" to its analysis and the right to bear arms "is no longer something that can be withdrawn by the government on a permanent and irrevocable basis without due process."[47] Thus, the First Circuit reasoned that a temporary hospitalization under Maine's Section 3863 (permitting three-day involuntary hospitalizations without any formal proceeding)[48] could not be considered a "commitment" under § 922(g)(4).[49] In dicta, the court mentioned that the case's outcome would have been different if the federal law allowed a way for those who had been "temporarily hospitalized on an emergency basis to recover, on reasonable terms, a suspended right to possess arms on a showing that [they] no longer posed a risk of danger."[50] The court also suggested that the federal law provide a way to temporarily suspend the right to bear arms "pending further proceedings."[51]

In the wake of the Supreme Court's decision in *Heller*, the circuits seem to be confused regarding how broadly to apply § 922. Up until *Heller*, the application of the federal law had been somewhat aggressive, leaning

40 *Id.* at 75–76.

41 *Id.* at 75.

42 United States v. Chamberlain, 159 F.3d 656, 665 (1st Cir. 1998) (holding that an involuntary five-day commitment counted as "committed to a mental institution" under § 922(g)(4)).

43 United States v. Rehlander, 666 F.3d 45, 47 (1st Cir. 2012)

44 *See* District of Columbia v. Heller, 554 U.S. 570, 636 (2008) (invalidating a total ban on firearm possession in the home as unconstitutional).

45 *Id.* at 595.

46 *Id.* at 626.

47 *Rehlander*, 666 F.3d at 48.

48 Section 3863 previously had permitted five-day temporary hospitalizations. United States v. Chamberlain, 159 F.3d 656, 657 (1st Cir. 1998). The individual in *Chamberlain* had been involuntarily hospitalized for five days. *Id.*

49 *Rehlander*, 666 F.3d at 48–50.

50 *Id.* at 49.

51 *Id.*

on Congress' intent for "broad" protective coverage.[52] However, after *Heller*, at least one circuit has reconsidered this strategy.[53] The *Heller* decision has likely confused more than it has clarified, which may lead to a lack of uniformity in judicial application. Thus, to correct this confusion, I propose that Congress amend the federal law to include better, less-vague guidelines for courts to follow when applying § 922(g)(4).

3. Overinclusive and Underinclusive

While the Act does indeed suffer from vagueness, its most serious problem is its breadth—it is at once both overinclusive and underinclusive. It is overinclusive because the terms "adjudicated as a mental defective" and "committed to any mental institution" for "mental defectiveness" appear on their face to apply to *any* person suffering from severe mental illness, regardless of the presence of dangerousness. Thus, the statute's underlying assumption is that those who are considered to be "mentally defective" are inherently dangerous. Because of this assumption, the statute includes in its definition many individuals who may never be violent. For example, it includes individuals who have been found to lack the mental capacity to manage their own affairs and those who have been involuntarily committed for reasons other than substance abuse or violent behavior. However, studies have shown that individuals who do not exhibit certain "risk factors" are no more likely to engage in gun violence than the general population,[54] yet under the current framing of the law these individuals are permanently denied their Second Amendment right to bear arms.

In addition to being overinclusive, the federal law is also underinclusive since it fails to reach many of the individuals with mental illness who may be most dangerous. Researchers have repeatedly found that while a majority of persons suffering from mental illness will never be violent, there are important factors that may help predict future violence—primarily substance abuse and a history of violent behavior.[55] As it stands now, the federal statute does, at best, a poor job of distinguishing individuals who are prone to violence from those who are not. Due to the statute's vagueness and outdated assumptions, many of the dangerous mentally ill are not currently prohibited from purchasing firearms under

52 Dickerson, v. New Banner Inst., Inc., 460 U.S. 103, 112 (1983).

53 *See e.g., Rehlander*, 666 F.3d at 47–49.

54 Elbogen & Johnson, *supra* note 10, at 157 (finding that individuals with severe mental illness, but without a history of violence or substance abuse, had the same chances of being violent within the next three years as any person without mental illness); Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 769 (1990) (concluding that the presence of alcohol and drug abuse substantially increased the risk of violence in persons with mental illness).

55 Torrey, *supra* note 8, at 659 ("The vast majority of individuals with serious mental illness are not violent and are not more dangerous than individuals in the general population."); Peter F. Buckley et al., *Treatment of the Psychotic Patient Who is Violent*, 26 PSYCHIATRIC CLINICS N. AM. 231, 233, 235 (2003) (noting that violence is more closely related to substance abuse than major mental illnesses, and that history of violence is the "best predictor" of future violence); Swanson et al., *supra* note 54, at 769.

federal law. For example, the statute does not cover individuals who suffer from mental illness and have been determined to be an imminent danger to themselves or others by a licensed psychotherapist, convicted of an alcohol or drug-related crime, convicted of a violent crime, or voluntarily committed for reasons such as dangerousness or substance abuse.[56] Despite the fact that individuals who fall into these categories are significantly more likely to commit gun violence than both the general population and persons who suffer only from mental illness, most of them are free under federal law to purchase or possess guns.[57]

B. THE LINK BETWEEN VIOLENCE AND MENTAL ILLNESS

Research shows that mental disorders affect tens of millions of people each year in the United States, and it is estimated that only about half of those affected receive treatment.[58] The National Alliance on Mental Illness provides that, in a given year, approximately one in twenty adults will suffer from a "serious mental illness" that will substantially interfere with his or her life.[59] Unfortunately, however, the high prevalence of mental illness among adults has not led to a general public understanding of how mental illness works, and what it really means to be "mentally ill." In light of this misperception, researchers over the past few decades have attempted to prove, or disprove, the link between violence and mental illness.

One 1994 study, conducted by E. Fuller Torrey, explored the "perceived association between violent behavior and serious mental illness" by examining recent studies and media accounts of violent behavior exhibited by individuals with mental illness.[60] The study first explored how the mentally ill are portrayed in the media, finding that 72 percent of mentally ill characters on TV shows were cast as violent, and that newspaper stories linking mental illness to crimes are more likely to be placed on the front page.[61] Torrey then turned to recent studies conducted to examine the link between mental illness and violence, concluding that "the vast majority of individuals with mental illness are not violent and are not more dangerous than members of the general population."[62] However, Torrey also found that the presence of three factors, in combination with severe mental illness, were strong predictors of violence: a history of violence, concurrent alcohol or drug abuse, and noncompliance with medication.[63] This finding is particularly important, since one study

56 *See* 18 U.S.C. § 922 (2012).

57 *Id.*

58 *Statistics*, *Health & Education*, NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml (last visited Nov. 8, 2015).

59 *Mental Health by the Numbers*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers (last visited Nov. 8, 2015).

60 Torrey, *supra* note 8, at 653.

61 *Id.*

62 *Id.* at 658.

63 *Id.* at 659.

examined by Torrey found that almost one-third of participants with schizophrenia or schizophreniform disorder also suffered from alcohol or drug abuse.[64] Thus, in order to defeat the stereotype that all individuals with mental illness are dangerous and unpredictable,[65] there needs to be a shift towards focusing on what factors make a person more prone to violence.

Another study, entitled the Dunedin Study, examined the link between mental disorders and violence by studying 961 young adults, which made up 94 percent of a birth cohort in New Zealand.[66] The study found that, among the young adults, the increasing probability of engaging in violence was limited to three factors: alcohol dependence, marijuana dependence, and schizophrenia-spectrum disorder.[67] Individuals displaying at least one of these three disorders made up only one-fifth of the birth cohort, but committed more than half of the violence performed by the group.[68] Additionally, if two or more of the disorders were present in any individual (known as "co-morbidity"), the risk of violence became eight to eighteen times greater than the risk associated with individuals who possessed none of the three disorders.[69]

The Dunedin findings are strikingly similar to those of Jeffrey Swanson and his team who examined the results of the National Institute of Mental Health's Epidemiologic Catchment Area surveys in 1990.[70] The surveys had 10,059 respondents offer information regarding whether they had experienced incidents of violence during the current year.[71] More than half of the 368 individuals who reported violence met the criteria for psychiatric disorder.[72] Substance abuse was "by far the most prevalent diagnosis among those who were violent . . ."[73] To further examine the link between mental disorders and violence, the study separated violent respondents into four diagnostic groups: those with anxiety disorder, those with affective disorder, those with substance abuse, and those with schizophrenia spectrum disorders.[74] The researchers then combined the groups in all possible ways and measured the percentage of violence reported from each combination.[75] The three categories with the highest percentage of violence all included a diagnosis of substance abuse: (1) schizophrenia, substance abuse, and affective disorder; (2) schizophrenia and substance abuse; and

64 *Id.* at 657.

65 *Id.* at 653.

66 Louise Arseneault et al., *Mental Disorders and Violence in a Total Birth Cohort*, 57 ARCHIVES GEN. PSYCHIATRY 979, 980 (2000).

67 *Id.* at 984.

68 *Id.*

69 *Id.*

70 Swanson et al., *supra* note 54.

71 *Id.* at 764.

72 *Id.* at 764–65.

73 *Id.* at 765. About 42 percent of violent responders suffered from alcohol or drug abuse, while only about 5 percent of non-violent responders suffered from alcohol or drug abuse. *Id.*

74 *Id.* at 765–66.

75 *Id.* at 766.

(3) affective disorder and substance abuse.[76] These groups had violence rates at 100 percent, 30 percent, and 29 percent, respectively.[77] The researchers noted that the "public fear of persons with schizophrenia" is "largely unwarranted," and that when trying to predict future violence one should primarily look to individuals who also suffer from substance abuse, since they were the group with the highest rates of violence.[78]

A more recent study, conducted in 2009, used data collected from the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC) to examine the link between mental disorders and violence.[79] Analysis showed that, while rates of violence were higher for individuals with severe mental illness, they were significantly higher if substance abuse or dependence was also present.[80] Thus, the study concluded that severe mental illness alone was not an accurate predictor of future violence.[81] The results suggested that in order to better understand the link between mental illness and violence, one must also examine the existence of other factors, specifically substance abuse and history of violence.[82] When either of these two variables were found in individuals with severe mental illness, the risk of violence was "distinctly higher" than average.[83] Additionally, 46 percent of the survey participants with severe mental illness reported that they "had a lifetime history of comorbid substance abuse and/or dependence."[84]

These studies, along with many others, support the proposition that mental health advocates have been claiming for years—that an individual is not more prone to violence simply because he or she suffers from mental illness.

C. STATE LAWS

It is important to note that the Federal Gun Control Act of 1968 only applies to federally-licensed firearms dealers who conduct business in interstate commerce.[85] Any gun transfers made in intrastate commerce are regulated by state law. However, about half of the states currently have gun laws that mirror the language found in the federal law.[86] Six states—Alabama, Alaska, Colorado, Kentucky, New Hampshire, and Vermont—do not have their own gun control laws and default to federal law.[87]

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76 *Id.*
77 *Id.*
78 *Id.* at 769.
79 Elbogen & Johnson, *supra* note 10.
80 *Id.* at 152.
81 *Id.* at 159.
82 *Id.*
83 *Id.*
84 *Id.* at 156.
85 18 U.S.C. § 922(a)(1)(A) (2012).
86 *See* Reid Wilson, *State Rules Vary on Guns for the Mentally Ill*, WASH. POST: GOVBEAT (Sep. 20, 2013), http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/20/state-rules-vary-on-guns-for-the-mentally-ill/.
87 *Id.*

In light of recent shootings, several states have added new statutes focused on reducing gun violence. For example, in California it is now illegal to sell guns to persons who (1) have been voluntarily admitted to a psychiatric facility and are receiving inpatient treatment for a mental illness, (2) have been labeled a danger to themselves or others by the attending mental health professional, (3) have communicated a threat of physical violence to a "reasonably identifiable victim" to a licensed psychotherapist, or (4) have been involuntarily placed on a seventy-two hour hold because they are a danger to themselves or others.[88]

While California's approach to gun control, which focuses more on dangerousness than the mere presence of mental illness, is likely to be effective at reducing gun violence, not all of the states have made the move to distinguish between persons with mental illness and those with mental illness who are likely to be dangerous. In 2013, Connecticut passed a law making it illegal for people who had been involuntarily committed for mental illness to obtain a gun permit for five years after the commitment.[89] While Connecticut lawmakers no doubt believed that they were enacting effective legislation, the passage of this new law illustrates how the stigma associated with mental illness still persists. The statute's language is strikingly similar to that of the federal law which was enacted almost fifty years ago.[90] Both Connecticut's newly passed statute and the federal statute suffer from the underlying assumption that the mere presence of mental illness signals future violence, an assumption that has been repeatedly refuted in scientific studies.

In order to try to improve this discrepancy among state gun control laws, the federal law should be amended to target individuals with mental illness who also have certain "violence risk factors" present—specifically, a history of violent behavior and substance abuse. Despite the fact that the federal law only regulates gun sales made in interstate commerce, it is used as a model around which many states fashion their own laws. Thus, in order to have effective gun reform, the federal law must first be amended, and the states should afterwards be encouraged to follow suit. If the federal law is in fact amended, there would likely be political incentives for state lawmakers to pass similar legislation, given the current environment regarding gun control in the United States. It is because of this current environment, where the public is constantly pushing lawmakers to strengthen gun control laws targeted at the mentally ill, that we must ensure that the legislation being proposed and passed is both effective and grounded in reality.

88 CAL. WELF. & INST. CODE §§ 8100–8108 (West); CAL. WELF. & INST. CODE § 8103(f)(1) (West 2015); Michael Corcoran, *Mental Health Checks When Purchasing a Gun*, WORKTHREAT GROUP, LLC, http://workthreat.com/mental-health-checks-when-purchasing-a-gun/ (last visited Nov. 8, 2015).

89 2013 Conn. Pub. Acts 3.

90 *See id.;* 18 U.S.C. § 922 (2012).

D. PROPOSAL

As previously explained, the federal law is vague, inefficient, and perpetuates misconceived notions about individuals suffering from mental illness. Thus, I propose that it be amended to make it illegal to sell firearms to individuals with mental illness who have been: (1) convicted of a violent crime; (2) convicted of an alcohol or drug-related crime; (3) deemed an imminent danger to themselves or others by a court, board, commission, or licensed psychotherapist; or (4) committed to a psychiatric institution, voluntarily or involuntarily, because they have been deemed an imminent danger to themselves or others (including for temporary emergency holds).

Instead of being concerned solely with whether an individual suffers from severe mental illness, this proposed amendment focuses on the presence of factors that have been established as significant predictors of violence.[91] Additionally, this amended language eliminates the outdated (and offensive) term "mentally deficient." As briefly explored earlier, the term perpetuates the idea that an individual is dangerous simply because he or she lacks the mental capacity or "mental responsibility" that is supposedly present in individuals in the general population. This stereotype is outdated, and is what my proposed amendments aim to eliminate.

1. Convicted of a Violent Crime

A history of past violence is one of the best predictors of future violence.[92] Studies have repeatedly found a strong positive correlation between mentally ill individuals with a history of violence and acts of future violence.[93] Specifically, the "risk of future violence increases linearly with the number of past violent acts."[94]

One study, discussed earlier, analyzed the results from the NESARC by interviewing over thirty thousand participants in two waves.[95] During wave one the researchers asked whether the participants had ever engaged in "serious/severe violence" or "substance-related violence."[96] During wave two interviews, which generally occurred about three years after the wave one interviews, the individuals were asked whether they had engaged in "serious/severe violence" or "substance-related violence" since their previous interviews.[97] By using multivariate analysis, a type of analysis that

91 Swanson et al., *supra* note 54, at 769 (finding that the interaction between major mental illness and substance abuse is a "statistically significant predictor of violence"); Elbogen & Johnson, *supra* note 10, at 155–56 (concluding that previous incidents of violence and substance abuse, when combined with mental illness, increased the chances of violence significantly more than the mere existence of mental illness).

92 Buckley et al., *supra* note 55, at 235.

93 *See* Rueve & Welton, *supra* note 9, at 42; Elbogen & Johnson, *supra* note 10, at 155; Buckley et al., *supra* note 55, at 240; Arseneault et al., *supra* note 66, at 980.

94 Rueve & Welton, *supra* note 9, at 42.

95 Elbogen & Johnson, *supra* note 10, at 153.

96 *Id.* at 154.

97 *Id.*

uses more than one statistical outcome at a time, the researchers were able to determine which factors contributed most to the risk of future violence.[98]

The researchers found that a "history of any violence" was the strongest predictor for future "severe" violence, and the second-strongest predictor for "any" future violence.[99] The study also discovered the combinations of factors that presented the highest risk of future violence.[100] Individuals with severe mental illness coupled with substance abuse were more at risk of committing future violence than individuals with only one of the disorders.[101] However, the highest risk category was individuals who had two disorders and a history of violence.[102] These individuals were around ten times more likely to be violent than those who exhibited severe mental illness only.[103] The researchers also noted that their results affirmed the conclusion reached by other research, which is that individuals with "any severe mental illness" are more likely to have a history of violence than those without mental illness.[104]

Thus, given the importance of history of violence in predicting future violence, the federal law should be amended to prohibit the transfer of firearms to any person with mental illness who has been convicted of a violent crime. The FBI's Uniform Crime Reporting (UCR) Program defines "violent crimes" as "those which involve force or threat of force."[105] There are five offenses which constitute a federal "violent crime": aggravated assault, forcible rape, robbery, and murder or non-negligent manslaughter.[106] These crimes are sufficiently heinous and violent to justify the deprivation of an individual's Second Amendment right to bear arms, which is a main concern of courts when assessing the constitutionality of statutes.[107]

For the two most violent crimes—murder and rape—I propose that the federal law impose an irrevocable lifetime ban on those convicted. This is somewhat repetitive, since 18 U.S.C. § 922(g)(1) imposes a lifetime firearm ban on any person who has been convicted of a "crime punishable by imprisonment for a term exceeding one year." However, the main goal of amending the federal law is to shift its focus to dangerousness, as opposed to its current focus on the mere existence of severe mental illness.

98 *Id.*
99 *Id.* at 158.
100 *Id.*
101 *Id*.
102 *Id.*
103 *Id.* at 155.
104 *Id.*
105 FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2010, VIOLENT CRIME (2011), https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violentcrimemain.pdf.
106 *Id.* Since individuals convicted of a misdemeanor crime of domestic violence are already banned under federal law for life from purchasing or possessing firearms, I have not included the crime of domestic violence in my proposal under "violent crime." 18 U.S.C. § 922(g)(9) (2012).
107 *See* United States v. Rehlander, 666 F.3d 45, 47–48 (1st Cir. 2012).

By adding this section imposing an irrevocable lifetime firearm ban on individuals with mental illness who have committed violent crimes, the hope is that both the state legislators and the public begin to distinguish between persons with mental illness and *dangerous* persons with mental illness.

My proposal for the two remaining violent crimes, assault and robbery, is to impose an irrevocable ten-year firearm ban. Of course, if the individual has been sentenced to more than one year of imprisonment in any court, then he or she is banned for life from purchasing or possessing any firearm.[108] However, if the individual is awarded a lighter sentence (which may be conditional on outpatient treatment, probation, or a number of other alternatives), this law would restrict the individual's right to bear arms for ten years. This idea of a ten-year ban for the arguably less-violent "violent crimes" is taken from California's approach to convictions of domestic violence.[109] The policy behind the differentiation of sentencing for certain violent crimes is that those who commit excessively violent crimes, such as rape and murder, are the least likely to "reform" and thus should be prohibited from ever owning or possessing a gun. On the other hand, individuals who commit assault and robbery may have a better chance of changing their lifestyle and becoming less violent over time. Thus, if a court does not believe that an individual is culpable enough for a prison sentence exceeding one year, these persons should be able to have their Second Amendment rights restored after ten years.

2. Convicted of an Alcohol or Drug-Related Crime

It is well established that alcohol and drug abuse contribute greatly to violence figures in the United States.[110] In fact, drug abuse is so intimately linked to violence rates that § 922(g)(3) of the Federal Gun Control Act places a lifetime firearm ban on anyone who "is an unlawful user of or is addicted to any controlled substance."[111] Alcohol, on the other hand, is not considered a "controlled substance" and there is no such lifetime firearm ban on alcohol abusers.[112] However, despite their disparate treatment, alcohol and drugs are both major contributors to violence, especially among those with mental illness.

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108 18 U.S.C. § 922(g)(1) (2012).

109 CAL. PENAL CODE § 29800 (West 2012).

110 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FACT SHEET: DRUG-RELATED CRIME (1994), http://www.bjs.gov/content/pub/pdf/DRRC.PDF ("Drug users in the general population are more likely than nonusers to commit crimes."); Steadman et al., *supra* note 10, at 399–400 (finding that substance abuse significantly raised violence rates in both the patient sample and the community sample); Swanson et al., *supra* note 54, at 765 (observing that substance abuse was the "most prevalent diagnosis" among participants who were violent).

111 18 U.S.C. § 922(g)(3) (2012). "Controlled substance" is further defined as any substance or drug included in schedules I–V of § 812(b) found in Title 21 of the United States Code. 21 U.S.C. § 802(A)(6) (2012).

112 21 U.S.C. § 812(b) (2012); *see also* 21 U.S.C. § 802(6) (2014) (stating that "controlled substance" does not include "distilled spirits, wine, malt beverages, or tobacco").

The 2009 NESARC study (discussed above) found that 46 percent of patients interviewed who had a severe mental illness also reported a "lifetime history of comorbid substance abuse and/or dependence."[113] Another study, conducted in 1998, measured the rate of community violence in three different U.S. cities by interviewing two different samples—patients discharged from acute psychiatric facilities and people living in the neighborhoods—over a period of several months.[114] Among other things, the study found that the patients discharged from the facility were "significantly more likely" to exhibit symptoms of substance abuse than the individuals from the community sample.[115] This connection is particularly troublesome, given the potential effects that alcohol and drugs can have on a person suffering from a severe mental illness, such as a psychotic disorder. Substance abuse can increase present symptoms, such as paranoid thinking, while also introducing new symptoms, such as disinhibition and irritability.[116]

Substance abuse or dependence has been described as "perhaps the most frequently cited dynamic risk factor" for future violence.[117] The NESARC researchers noted that individuals exhibiting both severe mental illness and substance abuse had a "significantly higher incidence rate of violent acts . . . even compared with subjects with substance abuse alone."[118] Other studies have backed up this finding, concluding that substance abuse coupled with severe mental illness is a "statistically significant predictor of violence."[119] Researchers analyzing the results from the Epidemiologic Catchment Area Surveys found that the three diagnostic group combinations with the highest risk of violence all included substance abuse coupled with some form of mental disorder.[120] Additionally, another study comparing the prevalence of community violence between a sample of patients discharged from an acute psychiatric facility and individuals living in the community found that "co-occurring substance abuse disorder [was] a key factor in violence."[121] Specifically, violence rates were 17.9 percent for persons with a major mental disorder and 31.1 percent for persons with both a major mental disorder and a substance abuse diagnosis.[122]

113 Elbogen & Johnson, *supra* note 10, at 156.

114 Steadman et al., *supra* note 10, at 394.

115 *Id.* at 400.

116 Buckley et al., *supra* note 55, at 234.

117 Rueve & Welton, *supra* note 9, at 42. "Dynamic risk factors" have the potential to be changed through clinical intervention, and they are usually similar or identical to the same clinical symptoms that patients are hospitalized for. *Id.*

118 Elbogen & Johnson, *supra* note 10, at 156.

119 *See* Swanson et al., *supra* note 54, at 769.

120 Groups were labeled from "No disorder" to "Four diagnostic groups," with sixteen potential categories for individuals to fall under. *Id.* at 766.

121 Steadman et al., *supra* note 10, at 399–400.

122 *Id.*

Thus, because of the significant relationship between substance abuse and violence (specifically among individuals with mental illness), I propose that the federal law be amended to prohibit the transfer of firearms to any person diagnosed with mental illness who has been convicted in any court of an alcohol or drug-related crime within the past three years. These crimes would include anything drug or alcohol-related, such as driving while intoxicated or the purchase, sale, or possession of any illicit substance. It is important to note that convictions of these crimes do not necessarily mean that the individual is a "substance abuser." However, given the considerable connection between substance abuse and violence, I believe that it is in the public's best interest to keep firearms away from persons with mental illness who illegally used or possessed alcohol or drugs. Thus, while this portion of the proposed federal law may be overinclusive in that it potentially covers individuals who are not habitual "abusers," there is likely a significant enough government interest in reducing gun violence to allow the law to pass constitutional muster.

Additionally, the three-year term of the prohibition helps ensure that individuals will not be unjustly deprived of their constitutional rights. After a conviction of any alcohol or drug-related offense, an individual would be banned from purchasing or possessing any firearm for a three-year period. After three years, the person would be required to undergo drug testing and also to participate in an interview with a licensed psychotherapist. If the individual tested positive for drugs, or if the psychotherapist believed that the individual exhibited signs of substance or alcohol abuse, the prohibition would be extended for another three years. However, if the individual was found to have no signs or symptoms of alcohol or drug abuse, then his or her Second Amendment rights would be automatically restored. Thus, this system would work to keep firearms out of the hands of individuals who pose a potentially high risk of committing gun violence, while simultaneously protecting the constitutional rights of those who may not be dangerous in the near future.

3. Deemed an Imminent Danger by a Court, Board, or Licensed Psychotherapist

California law currently places a five-year ban on firearm transfers to any person who has communicated "a serious threat of physical violence against a reasonably identifiable victim or victims" to a licensed psychotherapist.[123] The psychotherapist must then immediately report the threat to a local law enforcement agency.[124] California's approach has two distinct elements that are missing from the federal law (and most state laws). First, it goes further than most existing legislation by allowing a licensed psychotherapist, in addition to the prevailing "court or board," to determine whether the individual is a threat to self or others.[125] This is a

123 CAL. WELF. & INST. CODE § 8100(b)(1) (West 2014).
124 *Id.*
125 *Id.*

notable difference, and one that the federal law should also adopt. Generally, psychotherapists get to know patients more intimately than a court. If a psychotherapist has been seeing a particular patient over a period of time, that psychotherapist may detect changes in mood or personality that a person unfamiliar with the patient will not be able to. Additionally, psychotherapists must undergo years of schooling and training in order to get their licenses; even if they are unfamiliar with the patient, they are trained to recognize when an individual is exhibiting signs of danger. Thus, psychotherapists are in a better position to detect real threats and to determine whether a patient is a danger to themselves or others.

The second notable factor of California's law regarding psychotherapists is that it focuses on dangerousness, as opposed to the mere existence of mental illness.[126] For example, while Texas law does indeed go further than federal law by allowing licensed physicians to make determinations regarding an individual's gun rights, it falls short of ideal because of its focus on the mere existence of a mental disorder.[127] Instead of focusing on determining whether a patient is dangerous, the statute makes it illegal for any person to carry a concealed weapon who "has been diagnosed by a licensed physician as suffering from a psychiatric disorder or condition that causes or is likely to cause substantial impairment in judgment, mood, perception, impulse control, or intellectual ability."[128] As examined previously, countless studies have concluded that individuals diagnosed only with a mental disorder are not more prone to violence than the general population.[129]

Thus, taking this into account, I propose that the federal law be amended to prohibit the sale of guns to individuals who have been deemed an imminent threat to self or others by a licensed psychotherapist, as well as by a court, board, or commission. The "imminent threat" element would be taken from California law and be defined as a "serious threat of physical violence against a reasonably identifiable victim or victims."[130] The length of the ban would be a three-year term, after which the individual would be re-evaluated.[131] If the patient is still deemed an imminent threat, another three-year prohibition would be instituted. A period of three years is likely to be consistent with constitutional standards, given that many are hesitant to give therapists the power to permanently deprive individuals of their Second Amendment rights. Additionally, the potential for a re-application of the three-year ban attempts to ensure that those who continue to be a threat to self or others are prohibited from purchasing or possessing a

126 *Id.*

127 TEX. GOV'T CODE ANN. § 411.172 (West 2009).

128 *Id.*

129 *See* discussion *supra* Part II.B.

130 CAL. WELF. & INST. CODE § 8100(b)(1) (West 2014).

131 Before an amendment in 2013, California law prohibited gun sales for a period of six months after the evaluation of a serious threat by a licensed psychotherapist; the term now is five years. 2013 Cal. Legis. Serv. 5517–31 (West); CAL. WELF. & INST. CODE § 8100 (West 2014).

firearm. Thus, this proposal attempts to sufficiently balance a person's right to bear arms against the public's right to safety.

4. Committed to a Psychiatric Institution or Hospital

Under the current federal law, a lifetime ban is imposed on any person who has been involuntarily "committed to a mental institution."[132] It does not cover individuals who are committed "for observation," and instead focuses on patients who are committed long-term.[133] Many of the states have enacted similar legislation aimed at persons who have been committed to a mental institution. Connecticut, for example, will not give a handgun eligibility certificate to any person who was committed to a mental hospital for "psychiatric disabilities" within the past year.[134] Delaware law takes it a step further, making it illegal for anyone who has *ever* been committed to a mental institution or hospital for a mental disorder to own, purchase, or possess a firearm.[135] However, while these state laws may differ slightly in their language, they all are generally aimed at the same thing—keeping guns out of the hands of people who have been committed to a hospital for the presence of a mental disorder. This goal is shared by a significant number of states, including Arkansas, Georgia, Illinois, Massachusetts, and New Jersey, to name a few.[136] In an attempt to protect patients' Second Amendment rights, some states have added provisions to their laws stating that the prohibition will be revoked if a doctor or physician determines that the individual's right to bear arms should be restored.[137]

However, while the possibility of rights restoration is a step in the right direction, the current federal and state laws are still likely to be ineffective because, as addressed previously, the mere existence of a serious mental disorder is not an accurate predictor of future violence.[138] For example, the 2009 NESARC study concluded that neither schizophrenia, major depression, nor bipolar disorder were predictors of violence.[139] The researchers also found that a person with severe mental illness, who did not also exhibit substance abuse or a history of violence, had the same chances of being violent within the next three years as a person from the general population.[140] Studies conducted over the past decades have consistently

132 18 U.S.C. § 922(g)(4) (2012); 27 C.F.R. § 478.11 (2014) (explaining that the federal statute does not include voluntary commitments).

133 27 C.F.R. § 478.11 (2014).

134 CONN. GEN. STAT. § 53a-217c (2013).

135 DEL. CODE ANN. tit. 11, § 1448 (2014).

136 ARK. CODE ANN. § 5-73-103 (2009); GA. CODE ANN. § 16-11-129 (2015); 720 ILL. COMP. STAT. 5/24-3.1 (2015); MASS. GEN. LAWS ANN. ch. 140, § 131 (West 2015); N.J. STAT. ANN. § 2c:58-3 (West 2013).

137 Such as Connecticut, Massachusetts, Minnesota, and New Jersey. CONN. GEN. STAT. § 53a-217c (2013); MASS. GEN. LAWS ANN. ch. 140, § 131(d)(iii) (West 2015); MINN. STAT. ANN. § 624.713 Subd. 4(c) (West 2015); N.J. STAT. ANN. § 2c:58-3(c)(3) (West 2013).

138 *See* discussion *supra* Part II.B.

139 Elbogen & Johnson, *supra* note 10, at 155.

140 *Id.* at 157.

found that "most patients with stable mental illness do not present an increased risk of violence,"[141] and that it is only the presence of certain risk factors (namely, substance abuse and history of violence) that increases the chance of violence.[142]

California, once again, is the leading state in the race for effective gun control legislation. The California Welfare and Institutions Code Section 8100(a) provides a firearms prohibition on any person who is (voluntarily or involuntarily) receiving inpatient treatment from a facility *and* is believed by the primary attending physician to be a danger to self or others.[143] California's approach is progressive in two ways. First, it makes a prohibition conditional upon a physician's assessment of danger, not solely a commitment. Second, it makes a distinction between voluntary and involuntary commitment in general. These provisions are dependent upon each other; because the statute's main focus is on a determination of dangerousness, it is able to ignore the distinction between voluntary and involuntary commitment.[144]

Because of the established precedent of treating voluntary and involuntary commitments differently, the topic is worth spending time on. One reason for the difference in treatment is that the two carry different connotations. When one thinks of involuntary commitments, an image is conjured of an individual, most likely with disheveled hair and desperate eyes, being dragged into a hospital against his or her will. This image has been perpetuated by a combination of media, films, and social stigma. Voluntary commitments, on the other hand, summon a different image entirely. Society associates a certain amount of "reasonableness" to those who choose to commit themselves. One might assume that those who commit themselves voluntarily are more open to treatment, while those who are involuntarily committed will be resistant to treatment. One might also assume that those who are involuntarily committed are more prone to violence, because they are lacking the "reasonableness" found in those who are committed voluntarily. This seems to be the logic behind the current federal law and its purposeful exclusion of voluntary commitments.

However, in light of available empirical research and studies, making a distinction between voluntary and involuntarily commitments seems far less effective than the approach California has chosen to take—that is, focusing on dangerousness. A person may choose to be voluntarily committed for a combination of reasons, including substance abuse. As previously examined, substance abuse is one of the most significant predictors of future violence (along with history of violence). In contrast, individuals who are involuntary committed may exhibit none of the well-

141 Rueve & Welton, *supra* note 9, at 36.

142 *See* Swanson et al., *supra* note 54, at 769; Elbogen & Johnson, *supra* note 10, at 155-57; Buckley et al., *supra* note 55, at 233; Arseneault et al., *supra* note 66, at 979.

143 CAL. WELF. & INST. CODE § 8100(a) (West 2014).

144 The federal law, and several state laws, apply only to involuntary commitments. 27 C.F.R. § 478.11 (2014); KAN. STAT. ANN. § 59-2966(a) (2006); N.Y. PENAL LAW § 400.00 (McKinney 2013).

established violence risk factors, and thus placing a firearm prohibition on them would be ineffective at achieving the statute's overall goal. Therefore, I propose that the federal law be amended to mirror California's state law by making it illegal for a person to own or possess a firearm if they have been committed to a psychiatric institution (either voluntarily or involuntarily), and if the primary attending physician believes that the individual is a danger to self or others. There would be no minimum length of stay at the institution. The statute would cover any stay ranging from seventy-two-hour temporary emergency holds to commitments for an unspecified length of time.

While there is no distinction between voluntary and involuntary commitments in the proposed federal law, in order to safeguard constitutional rights there should be differences in the length of the ban determined based on the commitment duration. Temporary and emergency holds,[145] where the patient is deemed a danger to self or others, will automatically trigger a three-year prohibition. Long-term commitments (any commitment over thirty days), will trigger a five-year firearm ban, regardless of whether the commitment was voluntary or involuntary.

The policy behind this difference is to ensure that the persons who are temporarily committed are not being unjustly deprived of their right to bear arms. By their nature, temporary holds allow for less face time between physicians and patients. Thus, at least in theory, a physician will be better equipped to assess an individual's dangerousness if the individual is undergoing a long-term commitment. This reasoning accounts for the difference in prohibition lengths. However, to further protect the rights of both groups of patients (temporary and long-term), all patients can qualify to have their right to bear arms restored. They may do this by obtaining a written assessment from the primary attending physician indicating that the individual is no longer a danger to self or others. To offset this, the law will also provide that all patients undergo a re-evaluation interview at the end of their probation period. If the psychotherapist conducting the interview believes that the person remains a danger to self or others, the prohibition term (either three or five years) is renewed. The renewed term will also be subject to termination based on a determination by the primary physician that the individual is no longer dangerous.

In conclusion, this proposal attempts to make the federal law more effective by focusing on dangerousness, as opposed to the mere existence of mental illness. Each of the four proposed sections targets individuals with characteristics that have been shown to be accurate predictors of future violence. The proposed probation lengths for each section work to keep firearms out of the hands of dangerous individuals, while simultaneously being careful not to overstep an individual's Second Amendment rights. It is worth noting again that an amendment to the

145 Mainly seventy-two-hour and fourteen-day holds, which are authorized by state laws. *E.g.*, CAL. WELF. & INST. CODE § 5150 (West 2014) (allowing seventy-two-hour holds on individuals who are either "gravely disabled" or a danger to self or others).

federal law is just a first step. In order to effect real change, states must in turn pass legislation that is similar to the new federal law. The proposed law would then act as a model for the states, allowing them to amend the language or length of the firearm probation as they see fit.

III. STATE REPORTING TO THE NICS

A. HISTORY

In 1993 Congress passed the Brady Handgun Violence Prevention Act (or Brady Act), which established the National Instant Criminal Background Check System (NICS).[146] The NICS, which is maintained by the Federal Bureau of Investigation (FBI), requires federally licensed gun dealers to run a background check before the transfer of any firearm or ammunition.[147] If an individual is prohibited from purchasing a firearm either by state or federal law, the NICS lets the dealer know.[148] Ideally, the NICS would catch every individual prohibited from purchasing or possessing a firearm who attempts to do so. However, since its inception the NICS has hit significant speed bumps which have worked to hinder it from achieving its ultimate goal.

To begin with, the Brady Act only applies to federally licensed firearm dealers (FFLs).[149] FFLs are dealers who are engaged in the trade or business of selling firearms.[150] However, it is estimated that FFLs only account for about 60 percent of all gun sales in the United States.[151] The other 40 percent are transacted by unlicensed private sellers who are not, at least under federal law, required to run an NICS background check before the transfer of a firearm.[152]

On top of its limited applicability, the NICS has also proved inefficient for another reason. In 1997, the Supreme Court ruled that Congress could not compel the states to submit mental health and criminal records to the NICS.[153] The Court reasoned that forcing states to report to the NICS would violate the principles of federalism.[154] This proved a major blow to those hoping for a strong and powerful NICS. States have been extremely

146 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)).

147 *National Instant Criminal Background Check System*, *supra* note 12.

148 *National Instant Criminal Background Check System: Fact Sheet*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet (last visited Nov. 8, 2015).

149 *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)).

150 18 U.S.C. § 921(a)(11) (2006).

151 PHILIP J. COOK & JENS LUDWIG, NAT'L INST. OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 6–7 (1997), https://www.ncjrs.gov/pdffiles/165476.pdf.

152 *See id.* at 7.

153 Printz v. United States, 521 U.S. 898, 926, 935 (1997).

154 *Id.* at 935.

reluctant to submit records to the NICS, many claiming that technological and legal challenges make complete record submission near impossible.[155]

The year 2007 marked a turning point for the Brady Act. In April 2007, Seung-Hui Cho shot and killed thirty-two people at Virginia Polytechnic Institute (Virginia Tech).[156] The previous December, Cho had been confronted by campus police over a suicidal text message he had sent a fellow classmate.[157] Cho was taken to the Virginia Tech Police Department, where a licensed clinician found that he was "an imminent danger to self or others" and Cho was temporarily detained at a behavioral center.[158] After his release, Cho attended a commitment hearing where the district court judge ruled Cho to be a danger to himself.[159] Despite this ruling, within the next few months Cho was able to purchase two firearms—one through an internet dealer and another from a dealer in Roanoke, Virginia.[160] Since Cho met the criteria to be considered "adjudicated as a mental defective," his gun purchases were illegal under federal law.[161] This fact left many wondering how Cho could have purchased firearms so easily.[162] After conducting a thorough review of the legal environment and the events leading up to the massacre, the Virginia Tech Review Panel concluded that in order to have effective gun control, states must begin to report the information "necessary to conduct federal background checks on gun purchases."[163]

Shortly after the shootings at Virginia Tech and the publishing of the Report of the Virginia Tech Review Panel, Congress attempted to improve state reporting with the passage of the NICS Improvement Amendment Acts of 2007 (NIAA).[164] The NIAA provides incentives for states to meet specific reporting goals, such as financial grants and waivers of the National Criminal History Record Improvement Program's matching requirement if that state provides "at least 90 percent of its records identifying the specified prohibited persons."[165] The NIAA also provides both discretionary and mandatory grant penalties for states that fail to

155 GAO, *supra* note 13, at 9, 11–13. *See Mental Health Reporting Policy Summary*, SMARTGUNLAWS.ORG (Sep. 16, 2013), http://smartgunlaws.org/mental-health-reporting-policy-summary/.

156 VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH, REPORT OF THE REVIEW PANEL PRESENTED TO GOVERNOR KAINE OF VIRGINIA at vii (2007), http://www.washingtonpost.com/wp-srv/metro/documents/vatechreport.pdf.

157 *Id.* at 47.

158 *Id.*

159 *Id.* at 71.

160 *Id.*

161 He was found by a court to be a danger to himself, thus satisfying the federal law's requirement to being adjudicated as a mental defective under 18 U.S.C. § 922(g)(4) (2012).

162 *See* VA. TECH REVIEW PANEL, *supra* note 156, at 71.

163 *Id.* at 76.

164 NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 122 Stat. 2559 (codified as amended at 18 U.S.C. § 922 (2012)).

165 *The NICS Improvement Acts of 2007*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=tp&tid=49 (last visited Nov. 8, 2015).

comply with completeness requirements.[166] In addition to the requirements for the states, the Improvement Acts also created an "independent statutory obligation for federal agencies to report records identifying prohibited persons to the Attorney General no less than quarterly."[167]

In 2012 the United States Government Accountability Office (GAO) published a study assessing whether the NIAA was having its intended effect on state reporting.[168] The GAO found that from 2004 to 2011 the number of mental health records submitted increased by about 800 percent, but that increase was mostly attributable to the efforts of a few (twelve) states.[169] Almost half of the states increased their number of reports submitted by less than one hundred records.[170] This lack of a substantial increase was linked to "technological, legal, and coordination challenges."[171]

The Department of Justice (DOJ) and state officials reported that technological issues that states were dealing with, such as "updating aging computer systems and integrating existing record systems," were significant factors hindering the ability of states to report their mental health records to the NICS.[172] Another factor hindering state reporting was that "records originate from numerous sources within the state—such as courts, private hospitals, and state offices of mental health . . ."[173] Thus, records are not found in or controlled by a single entity, making it harder to ensure that they are reported to the NICS when necessary.

On top of these technological challenges, states also faced legal issues in reporting due to state and federal privacy laws.[174] Several states reported that they could not fully meet NICS's submission standards without "explicit state-level statutory authority to share mental health records."[175] However, the FBI did identify twenty states that have recently passed legislation requiring agencies to submit mental health records to the NICS.[176] The remaining states—those that have not enacted legislation expressly permitting the submission of mental health records—claim that the federal Health Insurance Portability and Accountability Act (HIPAA)

166 *Id.*
167 *Id.*
168 *See* GAO, *supra* note 13, at 2.
169 *Id.* at 9.
170 *Id.* at 10.
171 *Id.* at 11.
172 *Id*.
173 GAO, *supra* note 13, at 11–12.
174 *Id.* at 12.
175 *Id*.
176 *Id.* at 13. In fact, in the time since Adam Lanza killed twenty-six people at Sandy Hook Elementary on December 14, 2012, eleven states have enacted laws requiring better reporting and coordination of mental health records (Alabama, Colorado, Florida, Mississippi, New Jersey, North Carolina, South Carolina, Tennessee, Washington, Louisiana, and Minnesota). *See* Karen Yourish et al., *State Gun Laws Enacted in the Year After Newtown*, N.Y. TIMES (Dec. 10, 2013), http://www.nytimes.com/interactive/2013/12/10/us/state-gun-laws-enacted-in-the-year-since-newtown.html?_r=0.

Privacy Rule thwarts their reporting efforts.[177] The HIPAA Privacy Rule only allows "covered entities" to disclose an individual's personal health records without consent if certain specified conditions are met, such as when the disclosure is required by law.[178] A disclosure is only required by law if there is a court order, warrant, grand jury subpoena, or an administrative subpoena or summons that is related to "a legitimate law enforcement inquiry."[179] Thus, submission to the NICS is not explicitly allowed under the statute. Because this is a significant and pressing issue for more than half of the states, the DOJ has recently requested that the Department of Health and Human Services (HHS) amend the Privacy Rule to explicitly allow the disclosure of mental health records to the NICS.[180]

On top of these challenges faced by states, in 2011 the GAO also reported that the DOJ had failed to administer any of the reward and penalty provisions, which occupied a significant portion of the NIAA.[181] The DOJ stated that this was attributable to the fact that it was not clear whether "estimates, as currently collected, would ever reach the level of precision that would be needed to administer the NIAA reward and penalty provisions."[182] The study noted that if the DOJ could figure out an effective way to implement rewards and penalties for the states, it "could ultimately result in states providing more records for NICS background checks."[183]

Overall, the GAO concluded that the NIAA had been largely unsuccessful in getting states to submit an amount of records that would be reasonably necessary in order to improve the NICS's ability to eliminate the sale of firearms to prohibited individuals.[184]

B. PROPOSAL

In order for the NICS to function properly, the government needs to improve its current "carrot and stick" approach. That is, it should offer better financial grants to incentivize states to comply with record submission. In turn, states that fail to submit a certain amount of records should face harsher financial penalties, and the penalties should actually be imposed. As discussed in the previous section, the NIAA did in fact establish compliance incentives for states, such as waivers from the National Criminal History Record Improvement Program's matching requirements and financial grants.[185] However, the grants are only to be used for certain purposes, specifically those that are related to achieving

177 GAO, *supra* note 13, at 13.

178 *Id.*

179 45 C.F.R. § 164.512(f) (2013).

180 GAO, *supra* note 13, at 14. The HHS has not made a decision regarding whether or not to change the Privacy Rule, but is "in the process of reviewing the issue." *Id.*

181 *Id.* at 24.

182 *Id*. at 26.

183 *Id.* at 35.

184 *Id.* at 34.

185 *The NICS Improvement Acts of 2007*, *supra* note 165.

completeness goals regarding record submission to the NICS.[186] In 2014, the federal government issued over eleven million dollars in financial grants.[187] While this is not an insignificant number, the fact that the grants went to only seventeen of the states raises concerns about the compliance numbers of the remaining thirty-three states.[188] Perhaps a better approach would be to allow the states broader discretion regarding how to use the financial grants. This might entice some states that previously refrained to begin participating in the grant program.

Financial incentives are only one aspect of a "carrot and stick" approach. In addition to grants, there should be harsher penalties for states that fail to submit a reasonable amount of records. The NIAA mandated that both discretionary and mandatory grant penalties be imposed on states that failed to comply with "record completeness requirements."[189] However, these penalties have never been enforced. It is impossible to intimidate states into meeting compliance requirements if they know that realistically they will face no consequences for failure to do so. Thus, the government should make it a priority to first determine how to achieve reasonably accurate estimates for state compliance numbers, and then impose harsher fines on states that have not yet met the requirements.

In addition to a governmental effort, states also need to contribute to fix the current NICS problem. This effort should come in the form of state legislation requiring that state agencies and courts submit the relevant mental health records to the NICS in a timely manner. Since state submission is voluntary (a necessary condition of federalism), this type of legislation is needed in order to guarantee that the NICS is receiving the amount of records needed in order to operate effectively.

Fortunately, several states have already realized the need for this type of legislation and have taken proactive steps to improve their reporting numbers. In the years since the 2012 Sandy Hook Elementary shooting, eleven states have successfully passed legislation strengthening reporting requirements to the NICS and improving state databases on mental health.[190] These initial numbers are promising, and the legislation already enacted will improve effectiveness of the NICS. However, in order for the NICS to reach its full potential, the remaining states must also take measures to strengthen their reporting methods.

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186 *Id.* Authorized grant purposes include: creating electronic systems related to NICS checks, improving the accuracy and timeliness of the reporting of information regarding prohibited individuals, and collecting the data required to "demonstrate levels of state compliance." *Id.*

187 *State Profiles*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=tp&tid=491 (last visited Nov. 8, 2015).

188 *Id.*

189 *The NICS Improvement Acts of 2007*, *supra* note 165.

190 *See* Yourish et al., *supra* note 176 (the eleven states referenced are: Alabama, Colorado, Florida, Mississippi, New Jersey, North Carolina, South Carolina, Tennessee, Washington, Louisiana, and Minnesota).

IV. CONCLUSION

The 2003 firearm homicide rate in the United States was approximately twenty times higher than the rates of twenty-two of its peer countries.[191] Some attribute this ridiculously high number to the Second Amendment's grant of a "right to bear arms." Over the past several decades, federal and state lawmakers have been treading the line between protecting individual constitutional rights and trying to make our society safer. The principal example of this is found in the Federal Gun Control Act of 1968, which listed certain categories of persons who are prohibited from owning or possessing a firearm.[192]

In recent years, the occurrence of several violent and extremely publicized public shootings have spurred an intense national debate on gun laws, especially those regarding the mentally ill. In just the past three years, many states have passed bills strengthening gun control legislation. However, in order for any of these laws to be effective, several things need to happen. First, both federal and state legislation must be changed to focus on the dangerousness of the individual as opposed to the mere presence of mental illness. Studies have repeatedly found that mental illness alone is not an accurate predictor of future violence. Instead, laws should focus on the presence of certain established "risk factors" in individuals with mental illness. Second, the accuracy of the NICS must be improved. This can be done through offering better state compliance incentives, while also implementing harsher fines for non-compliance. These two steps must happen together, since one will not be able to effect any real change without the other. Although not be easy to implement, this proposed approach has real potential to reduce gun violence in the United States, which is one of the most pressing issues affecting the nation today.

191 Erin G. Richardson & David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States With Other High-Income Countries, 2003*, 70 TRAUMA, INJURY, INFECTION, & CRITICAL CARE 238 (2011).

192 18 U.S.C. § 922 (2012).