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Mentally Defective Language in the Gun Control Act

Jana R. McCreary

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“Mentally Defective” Language in the Gun Control Act

JANA R. MCCREARY

The oft-quoted argument asserts that “Guns don’t kill people; people kill people.” It is essential, then, that gun legislation clearly address who the people are who should not possess or purchase guns. As the country once again reacts to a tragedy with renewed interest in implementing new gun legislation, we must use caution to clearly identify who should be restricted from acquiring firearms.

The Gun Control Act of 1968 and its subsequent amendments fail at this task. When considering the ease with which persons with dangerous mental illnesses may legally purchase firearms because they do not meet technical and vague requirements under the Act—requirements put in place to prevent such persons from possessing firearms—it is clear that the Act fails. Tragic consequences result: six people dead at a grocery store in Tucson, Arizona at the hands of Jared Lee Loughner; twelve people dead at the hands of James E. Holmes in Aurora, Colorado. Additionally, when information to warn against illegal purchase of firearms is not requested due to ill-informed interpretations of the language, tragic consequences result: thirty-three people dead at the Virginia Polytechnic Institute and State University at the hands of Seung Hui Cho. Loughner, Holmes, and Cho had shown signs of mental illness. Loughner, Holmes, and Cho purchased their firearms, the firearms they used for the murders they committed, from federally licensed firearms dealers. Loughner did so legally. Holmes did so legally. Cho did so without vital information regarding his dangerousness ever being reported. These three men slipped through the cracks and fifty-one people died as a result. The cracks exist due to the Act’s language and its interpretation—its defective language.

This Article addresses the failure of the Gun Control Act regarding persons with dangerous mental illness who purchase firearms in spite of their status of being dangerously mentally ill. By looking at two headline-grabbing cases, the Article explores the dire consequences of the Act’s vague—and even misleading—language. Alternative approaches, including issuing permits, are suggested as means to help prevent such tragic outcomes and to guide new legislation.

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“Mentally Defective” Language in the Gun Control Act

JANA R. MCCREARY*

I. INTRODUCTION

In January 2011, Jared Lee Loughner carried his Glock 19 semiautomatic handgun loaded with a high-capacity magazine to a constituents meeting outside a grocery store in Tucson, Arizona. There, he opened fire, killing six people and wounding over a dozen more. News channels across the country captured the story and wrestled to explain this horrific tragedy.¹ First came the accusations of political motivation: in Loughner’s belongings, police found letters and notes that suggested Loughner was particularly upset with Congresswoman Gabrielle Giffords’s politics.² Upon closer examination, however, the writings—which

* Associate Professor of Law, Florida Coastal School of Law. I dedicate this Article to the memory of my father, Dr. Karon G. McCreary, who died June 26, 2012. He and I spoke many, many times on the issues of gun policy—he as an avid hunter and firearms collector, and me as his daughter whom he took shooting and whom he gave her first firearm—but me also as an attorney who, with an appellate court, worked on too many murder cases involving a death due to an easily-accessible firearm. My father and I, thus, often disagreed on some of the broad issues. But on the details, such as the problem I identify in this Article, he agreed a solution was needed. I regret we never got to discuss those possible solutions more.

Also, I would like to express my sincere gratitude to Sara McCollum and the other editors of the Connecticut Law Review. Their careful assistance in this piece—and their patience granted me during a difficult year—have no doubt helped make this a better work. In the end, of course, any errors or omissions are entirely my responsibility.

¹ See, e.g., Linda Feldmann, *Why Jared Loughner Was Allowed to Buy a Gun*, CHRISTIAN SCI. MONITOR, Jan. 10, 2011 (describing how gun control laws allowed Jared Loughner to buy a gun despite evidence of mental instability); see also *United States v. Loughner*, 769 F. Supp. 2d 1188, 1189 (D. Ariz. 2011) (describing the facts of the shooting).

² Compare Timothy Fitz, *AZ Shooter Jared Lee Loughner: Charged with Shooting Gabrielle Giffords, Killing Others, Inspired by Sarah Palin Tea Party?*, CHI. NEWS REP. (Jan. 8, 2011), <http://www.chicagonewsreport.com/2011/01/az-shooter-jared-lee-loughner-charged.html> (theorizing that Sarah Palin and the Tea Party inspired Loughner to commit the crime), with Chris Stirewalt, *The Scary World of Jared Loughner; Dems Target Political Speech*, FOXNEWS.COM (Jan. 10, 2011), <http://www.foxnews.com/politics/2011/01/10/scary-world-jared-loughner-dems-target-political-speech/> (arguing that Loughner was “a true loner whose interests and fixations [did not] meet any conventional political definition”). See also John Cloud, *The Troubled Life of Jared Loughner*, TIME, Jan. 15, 2011, available at <http://www.time.com/time/magazine/article/0,9171,2042358,00.html> (suggesting that mental illness, not political rhetoric, led Loughner to attack Congresswoman Giffords). The *Times* story continued:

It will never be possible to stop every unhinged person from committing awful crimes. But in the wake of the Tucson tragedy, we should be talking about how to

mentioned Giffords—appeared incoherent.³ What followed was an investigation into who Loughner was: a young man with disturbed thoughts who had inspired fear in those who knew him about his potential for violence.⁴

The next development in the story revealed that Loughner had purchased the gun he used, the Glock 19 semiautomatic handgun, fewer than six weeks before the shooting.⁵ He purchased it from a federally licensed firearms dealer. He purchased it legally.⁶ Despite having been ejected from a higher education program due to his bizarre behavior and recommendations for mental health intervention, he did not meet any of the restrictions against gun purchases.⁷

The Supreme Court has acknowledged that the right to purchase guns (albeit narrowly discussed by the Court as the right to possess handguns in one's home for self-defense purposes) is an individual right, fully applicable to the states.⁸ But this right is not without limitations. This right may be taken away. The Gun Control Act of 1968 (Gun Control Act), along with its amendments, narrows the pool of citizens who may legally purchase firearms from licensed dealers. One way that pool is limited is through a judicial determination of incompetency, or as a consequence of commitment in a mental institution.⁹ However, the

provide more mental-health care to those who display signs of needing it, not having a debate about whether rhetoric on TV and Twitter killed those six people.

Id.

³ See, e.g., *Profile of Suspect Jared Loughner: "I Can't Trust the Current Government,"* MSNBC (Jan. 9, 2011, 1:36 AM), http://www.msnbc.msn.com/id/40980334/ns/us_news-crime_and_courts/t/profile-suspect-jared-loughner-i-cant-trust-current-government#.UJLtdYUU7k0 (providing the text of many of Loughner's "rants").

⁴ *Id.*

⁵ Feldmann, *supra* note 1.

⁶ *Id.*

⁷ See *id.* (describing how Loughner's documented mental problems did not prevent him from buying the gun used in the shooting).

⁸ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (applying the Second Amendment to the states); *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (interpreting a right to possess handguns for personal self-defense). A recent Seventh Circuit decision may push the boundaries of this "self defense in the home" limitation. See *Moore v. Madigan*, 2012 WL 6156062, at *8 (7th Cir. Dec 11, 2012) (concluding that the limits prohibiting carrying firearms in public were too restrictive without justification).

⁹ Gun Control Act of 1968, 18 U.S.C. § 922(d)(4) (2006). One of the major objectives of the Gun Control Act was to deny specific populations access to firearms—felons, minors, and "persons who had been adjudicated as mental defectives or committed to mental institutions." Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975). Although many states have adopted gun control laws with different language, the focus of this Article will remain on the federal language in the Gun Control Act. The essential argument, even though states may expand rights of their citizens, is that this should be a baseline of prohibitions that should not be expanded. If a state expands those rights that might be understood in *Heller*, it would lessen the prohibitions.

contours of these limitations are anything but clear, such that the individual right to bear arms may very well do more harm than good.¹⁰ The future of Second Amendment litigation will be in challenging those laws that restrict rights of gun ownership and use. Because lower courts must work through issues of standards of review and due process,¹¹ it is difficult to predict if many of the existing limitations in gun control will survive challenges. However, with the Court's allusion to "presumptively lawful regulatory measures,"¹² which included an acknowledgement of the "longstanding prohibitions on the possession of firearms by . . . the mentally ill,"¹³ it seems safe to believe that the limitations on those "adjudicated as a mental defective or . . . committed to any mental institution"¹⁴ should be upheld.

Based on behavioral reports by those close to him,¹⁵ however, Jared Loughner appears to have suffered from mental illness when he killed six people.¹⁶ And many of those who knew him feared him to be dangerous.

¹⁰ See, e.g., Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. *Heller* and *Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 148–50 (2009) (analyzing statistics that suggest handgun violence increases as regulation of ownership decreases).

¹¹ See Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 296–97 (2011) (pointing out the repeated denial of the Court—and even the plurality—to articulate a standard of review in either *Heller* or *McDonald*). Lower courts are addressing the area of an appropriate standard of review for the newly-recognized fundamental right under the Second Amendment. Some are also extending this right to beyond the home. For example, in Illinois, an appellate court applied an intermediate level of review in holding a statute that "prohibit[ed] the carrying of an uncased, loaded and accessible firearm in the public street even by a law-abiding citizen for the lawful purpose of self-defense" was constitutional because the statute's goal was substantial and important while also reasonable (even if imperfect). *People v. Mimes*, 953 N.E.2d 55, 73 (Ill. App. Ct. 2011) ("[A]n individual's need for self-defense does not disappear outside the home."). An appellate court in Minnesota likewise applied intermediate scrutiny to hold constitutional a state law that prohibited possession of a firearm by a person who had been convicted of a "truly violent" crime. *State v. Craig*, 807 N.W.2d 453, 462, 464 (Minn. Ct. App. 2011) (relying heavily on *Heller*'s reference to "presumptively lawful regulatory measures" language); see also *United States v. Marzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying an intermediate level of scrutiny to conclude that a prohibition against possession of unmarked firearms is constitutional because the law did not impose a burden that "severely limit[ed] the possession of firearms," but also recognizing that Second Amendment challenges may be subject to different standards of review based on the restriction being considered). And at least one court has indicated that *Heller* has implemented a due process requirement before removal of Second Amendment rights. *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) (applying *Heller*'s due process guarantee to a person whose Second Amendment rights were withdrawn after a temporary involuntary emergency hospitalization).

¹² *Heller*, 554 U.S. at 627 n.26.

¹³ *Id.* at 626.

¹⁴ 18 U.S.C. § 922(d)(4).

¹⁵ Kate Pickert & John Cloud, *If You Think Someone Is Mentally Ill: Loughner's Six Warning Signs*, TIME (Jan. 11, 2011), <http://www.time.com/time/nation/article/0,8599,2041733,00.html>.

¹⁶ Marc Lacey, *Lawyers for Defendant in Giffords Shooting Seem to Be Searching for Illness*, N.Y. TIMES, Aug. 17, 2011, at A13 (noting two experts having diagnosed Loughner with schizophrenia and that he has been subjected to forced medication pending a determination of competency to stand trial).

Loughner pleaded guilty on August 7, 2012. See Bill Whitaker, *Loughner Found Competent, Pleads Guilty in Tucson Rampage*, CBS NEWS (Aug. 7, 2012), <http://www.cbsnews.com/8301->

Even so—like many others who have legally purchased firearms in spite of bizarre behavior observed by friends, associates, and loved ones—Loughner was able to purchase a gun.

The prohibition against the mentally ill possessing a firearm will likely be held constitutional, but that is not the concern. Instead, the problem lies in all those people who are dangerously mentally ill¹⁷ but who do not fall under the language of the Gun Control Act. The language is vague at best and misleading at worst. Stronger restrictions need to be in place. A permit should be required.

This Article brings to light the problems with the inconsistent interpretation and application of the Gun Control Act language that attempts to prevent persons with dangerous mental illnesses from purchasing firearms. Part II explains the inadequacies in some interpretations of the Gun Control Act by detailing two particularly deadly instances in which someone with a clear mental disorder legally purchased firearms and then used those weapons to commit mass murders. Part II also highlights several other examples of persons with mental disorders accessing and using firearms with fatal consequences. Part III analyzes the language of the Gun Control Act as it relates to issues involving mental illness: “adjudicated as a mental defective” or “committed to a mental institution.”¹⁸ Part III also reviews the various interpretations of that language. Part IV then suggests alternative approaches—each of which

18563_162-57488717/loughner-found-competent-pleads-guilty-in-tucson-rampage/?tag=contentMain;contentBody.

¹⁷ The use of the term “dangerously mentally ill” is used not as a medical diagnosis, but as a term intended to highlight that not all mental illness should be treated similarly under the Gun Control Act.

Mental illnesses are medical conditions that disrupt a person’s thinking, feeling, mood, ability to relate to others and daily functioning. . . . Serious mental illnesses include major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder (OCD), panic disorder, post traumatic stress disorder (PTSD) and borderline personality disorder.

What Is Mental Illness: Mental Illness Facts, NAT’L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/template.cfm?section=about_mental_illness (last visited Aug. 30, 2012). Although one in four adults in the United States experiences a mental health disorder each year, only one in seventeen suffer from a “serious mental illness.” *Id.*; see also NAT’L ALLIANCE ON MENTAL ILLNESS, MENTAL ILLNESS: FACTS AND NUMBERS, available at http://www.nami.org/Template.cfm?Section=About_Mental_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=53155 (providing statistics on mental illness). Still, even among those who suffer from a serious mental illness, they are not all *dangerously* mentally ill. The focus in this Article is on those who have a *dangerous* mental illness. Unfortunately, Congress failed clearly to make such a distinction in the language of the Gun Control Act. Thus, the Gun Control Act is both under-inclusive, as described in this Article, and over-inclusive, as based on the variety of diagnoses considered to be a “serious mental illness.” *What Is Mental Illness: Mental Illness Facts*, NAT’L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/template.cfm?section=about_mental_illness (last visited Aug. 30, 2012). Not all of these mental illnesses, however, should necessarily remove a right to possess a firearm for self-defense if a current danger does not exist.

¹⁸ 18 U.S.C. § 922(d)(4).

will need to be further developed in the future as new legislation is introduced—to prevent the recurrence of these deadly tragedies. The objective of this Article is to highlight the existing problems and to begin a dialogue to find solutions.

II. THE DANGER OF THE DANGEROUSLY MENTALLY ILL: HINDSIGHT IS TOO LATE

When people debate gun control laws, those in opposition often argue that we do not need gun control because “guns don’t kill people; people kill people.” And kill, these people did: Jarod Lee Loughner killed six people—and wounded thirteen more—on January 8, 2011. James Eagan Holmes killed twelve people—and wounded fifty-eight more—on July 20, 2012. Both Loughner and Holmes had previously shown signs of mental illness, causing those around them to express fear. Both Loughner and Holmes used guns subsequently in mass murders. Both Loughner and Holmes purchased their guns, seemingly legally, from federally licensed firearms dealers.¹⁹ These are their stories.²⁰

¹⁹ Even when dangerously mentally ill have been identified, the necessary information is not always reported in order to disqualify them from firearm purchase; deadly consequences have followed. Seung Hui-Cho killed thirty-two students and faculty members on April 16, 2007 even though he had been declared dangerous as a result of mental illness. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE VIRGINIA TECH REVIEW PANEL vii (2007) [hereinafter REPORT], available at <http://www.washingtonpost.com/wp-srv/metro/documents/vatechreport.pdf>. Cho used only two firearms during his shooting rampage in April 2007. *Id.* at 71. The Virginia Tech Review Panel acknowledged in its review conducted after Cho murdered over thirty people that Virginia State law was unclear regarding whether Cho was legally eligible to purchase a firearm. *Id.* at 71–72. However, he did not purchase his firearms legally under federal law; he should have been prohibited: a special justice had ruled that Cho “present[ed] an imminent danger to himself as a result of mental illness.” *Id.* at 48. As the Panel concluded,

Cho was not legally authorized to purchase his firearms, but was easily able to do so. Gun purchasers in Virginia must qualify to buy a firearm under both federal and state law. Federal law disqualified Cho from purchasing or possessing a firearm. The federal Gun Control Act, originally passed in 1968, prohibits gun purchases by anyone who “has been adjudicated as a mental defective or who has been committed to a mental institution.” Federal regulations interpreting the act define “adjudicated as a mental defective” as “[a] determination by a court, board, commission, or other lawful authority that a person, as a result of . . . mental illness . . . [i]s a danger to himself or to others.” Cho was found to be a danger to himself by a special justice of the Montgomery County General District Court on December 14, 2005. Therefore, under federal law, Cho could not purchase any firearm.

Id. at 71. Congress stated, in referencing Cho’s shootings as an impetus to its NICS Improvement Act, “In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting.” NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2(9), 121 Stat. 2559, 2559–60 (2008). However, both of these reports appear to want to blame communication or Cho for his firearm purchase.

Problems lie not only in failed communication of Cho’s status making him unable to possess or purchase firearms, but also in youth support services and systems. Cho experienced a sharp downward spiral that occurred in college—a sad example of the problems that arise in making accommodations in

A. *Jared Lee Loughner*

On January 8, 2011, Jared Lee Loughner, armed with a Glock 19 semiautomatic handgun with a high-capacity magazine,²¹ approached a political appearance by Representative Gabrielle Giffords at a Tucson grocery store and opened fire.²² He killed six people, including a nine-year-old girl and Federal District Judge John Roll, and he wounded thirteen others, including Representative Giffords.²³ Loughner purchased his firearm from Sportsman's Warehouse after passing a National Instant Check System (NICS) background check.²⁴ His purchase, from all appearances, was legal.

an academic setting without following through with supportive services and systems of accountability throughout one's education. This could continue, though, into one's employment as an adult; the student who cannot learn due to poor social skills may very well need more support than just removing him from the classroom. As we continue to make these accommodations for children, we are setting ourselves up for a segment of the next generation who cannot cope with stress, disagreements, or the simple relations that are required to function daily. In Cho's case, this occurred because his accommodations for his emotional disability were not in his educational record. REPORT, *supra*, at 37. Cho's high school transcripts did not reveal that he had received special education services. *Id.* at 38.

In asking why records of serious emotional disturbance were not included in Cho's file, the Virginia Tech Review Panel stated:

The answer is obvious: personal privacy. And while the panel respects this answer, it is important to examine the extent to which such information is altogether banned or could be released at the institution's discretion. No one wants to stigmatize a person or deny her or him opportunities because of mental or physical disability. Still, there are issues of public safety. That is why immunization records must be submitted to each new institution. But there are other significant threats facing students beyond measles, mumps, or polio.

Id. at 38.

The Panel reported that although a high school may disclose the information, a university may not inquire about it before admission. *Id.* Further, a student has no duty to inform a school about a disability. *Id.* at 39. The Panel recommended that this issue be studied further. *See, e.g.*, COUNCIL OF STATE GOV'TS, *Protecting Students and Students' Rights a Delicate Issue, Campus Violence and Mental Health*, available at <http://www.csg.org/knowledgecenter/docs/MentalHealth-CampusSafety.pdf> (last visited Nov. 18, 2012) (stating that privacy concerns regarding sharing of mental health records may be misunderstood by educational institutions, especially in the case of emergencies); *see also* Ann MacLean Massie, *Symposium: Introduction*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 1, 2 (2010) (noting how often students enter college with psychiatric issues but without the support of counseling, medication, or awareness of their conditions by those around them).

²⁰ No compilation of background and descriptions is available for Loughner's or Holmes's stories. Theirs, therefore, are pieced together through news reports, some court documents, and school records.

²¹ Feldmann, *supra* note 1; *see also Jared Loughner ID'd as Giffords Shooting Suspect*, CBS NEWS (Jan. 10, 2011), http://www.cbsnews.com/2100-201_162-7226347.html (describing the magazine used by Loughner in the shooting).

²² Alan Duke, *Loughner Sentenced to Life for Arizona Shootings*, CNN (Nov. 8, 2012), <http://www.cnn.com/2012/11/08/justice/arizona-loughner-sentencing/index.html>; Whitaker, *supra* note 16.

²³ Cloud, *supra* note 2; *Gabrielle Giffords*, N.Y. TIMES (Nov. 8, 2012), http://topics.nytimes.com/top/reference/timestopics/people/g/gabrielle_giffords/index.html.

²⁴ Feldmann, *supra* note 1.

Loughner dropped out of high school before his senior year.²⁵ His friends lost touch with him but have reported that he “seemed out of it, like he was somewhere else,” concluding that the change in behavior was not due, simply, to alcohol or marijuana.²⁶ Others reported that he spoke “in random strings of words” and “became paranoid that the government was trying to control him.”²⁷ Then he entered college. Loughner continued taking classes for five years at Pima Community College; after his bizarre behavior became focused at the school, however, he was asked to leave.²⁸

Five years after beginning classes at Pima Community College, Loughner’s behavior became notable. The Pima Community College police had contact with Loughner five times due to his disruptive behavior over a seven-month period in 2010.²⁹ In the months leading up to the shootings, Loughner demonstrated even more bizarre behavior at Pima. In a math class, he shouted, “How can you deny math instead of accepting it?”³⁰ And on an exam, he wrote, “Eat + Sleep + Brush Teeth = Math,” demonstrating disordered thoughts, and he showed signs of paranoia when he told “a classmate that U.S. currency was worthless and that the government was seeking to control people through grammar.”³¹

Loughner’s classmates noted his behavior and their fears. One classmate wrote in an email, “He scares me a bit. The teacher tried to throw him out and he refused to go.”³² Almost two weeks later, the same student said in another email, “He scares the living crap out of me.”³³ Loughner’s teacher was finally successful in having him removed from the class four weeks later—four weeks after his initial complaints were met with responses pointing out that Loughner had not hurt anyone or brought weapons to the school.³⁴

Although it seems accurate that Loughner had not actually hurt anyone or displayed any weapons, his behavior caused disruption and fear. At the same time, it seems the due process procedures in place for removing a

²⁵ Cloud, *supra* note 2.

²⁶ *Id.* (quoting Kylie Smith, who had known Loughner since preschool); *see also* Pickert & Cloud, *supra* note 15 (listing six warning signs that were indicative of mental illness in Loughner).

²⁷ Cloud, *supra* note 2.

²⁸ *Pima Community College Statement on Today’s Tragic Events*, PIMA CMTY. COLL. (Jan. 8, 2011), <http://www.pima.edu/press-room/news-releases/2011/201101-loughnerjan8.html> [hereinafter *Pima Statement*].

²⁹ *Id.*

³⁰ Timothy Noah, *Class Clown: Why Was It So Hard to Kick Loughner out of Pima Community College?*, SLATE (Jan. 10, 2011, 7:49 PM), http://www.slate.com/articles/business/the_customer/2011/01/class_clown.html.

³¹ Pickert & Cloud, *supra* note 15.

³² Noah, *supra* note 30.

³³ *Id.*

³⁴ *Id.*

student at Pima Community College might have been a barrier to assuring the safety of all the other students and faculty on campus.³⁵

On September 29, 2010, the school discovered a video on YouTube that Loughner had recorded.³⁶ In this video, Loughner claimed that the school was “illegal according to the U.S. Constitution,”³⁷ that the school was “a scam,” and that Pima and its students and teachers were “illiterate.”³⁸ After the discovery, the college immediately issued a letter of suspension that was delivered by campus police to Loughner at the residence he shared with his parents.³⁹ Other than following up to discuss the Code of Conduct and the suspension, the school prohibited Loughner from returning to Pima Community College.⁴⁰

Less than a week later, on October 4, 2010, Loughner and his parents met with school administrators.⁴¹ Loughner agreed to withdraw from school.⁴² A few days later, the school sent a final correspondence to Loughner indicating that “if he intends to return to the College, [Loughner] must resolve his Code of Conduct violations and obtain a mental health

³⁵ See *id.* (detailing the “due-process gauntlet” at Pima Community College, a comprehensive internal process involving numerous evaluative reviews). After tragedies of mass shootings, such as that at Virginia Tech, one might think schools would have a heightened sense of awareness of students whose behavior should send not only cautionary, but bright red, waving flags. When balancing the fear of litigation over removing a student from class with the chance that the student might actually become violent, perhaps the business interest wins. But when facing such issues in higher education, it would seem that the interest of all the other students and faculty being able to learn and work in a secure environment should outweigh any others. As posed by one journalist who wrote about the Tucson shootings, “What does a kid have to do these days to get kicked out of community college?” and “What about students who persistently disrupt classes but are simply jerks—or nonviolent nutcases?” *Id.* Would they also be allowed to stay in school and in classes? Surely no employer would allow such person to remain employed. Why do we allow today’s youth the ability to engage in such behavior?

³⁶ *Pima Statement*, *supra* note 28. Loughner apparently had posted several videos to YouTube. Rick Rojas, *Jared Lee Loughner, Shooting Suspect, Leaves YouTube Rants*, L.A. TIMES (Jan. 8, 2011), <http://articles.latimes.com/2011/jan/08/nation/la-na-jared-loughner-20110109>. Some of Loughner’s videos displayed text such as “[my] hope—is for you to be literate!” and “[i]f you’re literate in English grammar, then you comprehend English grammar,” as well as “[t]he majority of people, who reside in District-8, are illiterate—hilarious. I don’t control your English grammar structure, but you control your English grammar structure.” *Id.* (quoting printed text on videos allegedly uploaded to YouTube by Loughner). Loughner also “wrote of creating a new system of currency and designing coins: ‘You’re distributing your new currency lethally to people or you’re distributing your new currency non-lethally to people.’” *Id.* (quoting printed text on videos allegedly uploaded to YouTube by Loughner). “‘I know who’s listening: Government Officials, and the People,’” read one video. *Id.* (quoting printed text on videos allegedly uploaded to YouTube by Loughner). “‘Nearly all the people, who don’t know this accurate information of a new currency, aren’t aware of mind control and brainwash methods. If I have my civil rights, then this message wouldn’t have happen [sic].’” *Id.*

³⁷ *Pima Statement*, *supra* note 28.

³⁸ Noah, *supra* note 30.

³⁹ See *Pima Statement*, *supra* note 28 (describing the timeline of events leading to Loughner’s dismissal from Pima Community College).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

clearance indicating, in the opinion of a mental health professional, his presence at the College does not present a danger to himself or others."⁴³

Three months later, six people died at the other end of Loughner's gun.⁴⁴ Loughner's college wanted the assurance of a mental health professional that Loughner was not a danger to himself or others before he could attend class there again. No such requirements were needed before he bought a deadly weapon—a weapon that he used in a deadly manner.

B. *James Eagan Holmes*

Like the case involving Loughner, another recent mass shooting involved a suspect with reports of mental instability before he purchased all of the firearms used in his attack. In July 2012, James E. Holmes allegedly opened fire in a movie theater in Aurora, Colorado, killing twelve people and injuring fifty-eight others.⁴⁵ But Holmes's case is even more extreme than Loughner's.

It is reported that Holmes's psychiatrist alerted police regarding her concern of the threat Holmes posed.⁴⁶ These concerns may have even been expressed before Holmes purchased a high-powered rifle from a sporting goods store, a federal firearms licensee.⁴⁷ Additionally, three months earlier Holmes allegedly told classmates that he planned to kill people.⁴⁸ None of these warnings prevented Holmes from legally purchasing more firearms for his "growing arsenal."⁴⁹

How many other warning signs existed before Holmes purchased his other weapons remains to be seen.⁵⁰ What is clear is that Holmes was determined to be a danger. And Holmes was under the care of a psychiatrist who believed him to be a danger. But the technicalities of the

⁴³ *Id.*

⁴⁴ Cloud, *supra* note 2.

⁴⁵ See, e.g., Dan Harris, *James Holmes Bought Rifle After Failing Oral Exam at University of Colorado*, ABC NEWS (July 25, 2012), <http://abcnews.go.com/US/james-holmes-bought-rifle-failing-oral-exam-university/story?id=16850268> (detailing a timeline of events that culminated in Holmes's rampage during a showing of *The Dark Knight Rises*).

⁴⁶ Mark Greenblatt et al., *James Holmes' Psychiatrist Contacted University Police Weeks Before Movie-Theater Shooting: ABC Exclusive*, ABC NEWS (Aug. 12, 2012), <http://abcnews.go.com/US/james-holmes-psychiatrist-contacted-university-police-weeks-movie/story?id=16943858#UGulrFHe6Sp>.

⁴⁷ See Harris, *supra* note 45 (describing how Holmes purchased the weapons "hours after failing a key oral exam at the University of Colorado").

⁴⁸ See *Prosecutors: Theater Shooting Suspect Told Classmate He Wanted to Kill People*, CNN (Aug. 24, 2012, 5:14 PM), <http://www.cnn.com/2012/08/24/justice/colorado-shooting/index.html?iref=allsearch> (noting Holmes's alleged desire to kill others "when his life was over").

⁴⁹ Harris, *supra* note 45.

⁵⁰ Jack Healy & Dan Frosch, *Colorado Suspect Is Told He Faces 142 Counts as Case Inches Forward*, N.Y. TIMES, July 30, 2012, at A0.

Gun Control Act were not met; the Gun Control Act did not prevent Holmes from legally purchasing his firearms.⁵¹

C. *Related Instances*

Jared Loughner claimed national attention due, mostly, to his alleged target and the political storm that followed immediately after the Tucson shooting. James Holmes's shooting claimed more victims than any other mass shooting in the nation's history.⁵² But those incidents are not the only occurrences of persons with a possible mental illness purchasing firearms from licensed dealers. Even persons who, due to mental illness issues, should not have been allowed to purchase or possess firearms under the Gun Control Act have purchased firearms from licensed dealers.

1. *Seung Hui Cho*

The most notable example is Seung Hui Cho. On April 16, 2007, Seung Hui Cho shot and killed thirty-two students and faculty members before killing himself at Virginia Polytechnic Institute and State University (Virginia Tech).⁵³ Within five months of the massacre, a Virginia Tech review panel studied the shooting and Cho's life, reporting its findings to Governor Timothy M. Kaine in August 2007. The history, as described by the panel, demonstrates the failure of laws that were designed to prevent such a tragic loss of life.⁵⁴

⁵¹ See, e.g., Harris, *supra* note 45 (detailing a timeline of events that culminated in Holmes's rampage during a showing of *The Dark Knight Rises*).

⁵² See Christina Ng, *Prosecutor: Accused Aurora Shooter James Holmes Made Death Threat in March*, ABC NEWS (Aug. 24, 2012), <http://abcnews.go.com/US/accused-aurora-shooter-james-holmes-made-death-threat/story?id=17075107> (measuring by the number of people shot).

⁵³ REPORT, *supra* note 19, at vii.

⁵⁴ *Id.* at 1. As early as middle school, people in Seung Hui Cho's life noted homicidal ideations and referred him for psychiatric counseling. *Id.* His elementary school teachers recommended him for therapy to address socialization issues, but in middle school, his art therapist noted trouble represented in his drawings. *Id.* at 33, 36–37. A few months later, after the shootings at Columbine High School, his school recommended psychiatric counseling; Cho had expressed in his writings that he "wanted to repeat Columbine." *Id.* at 35. Cho's history is in stark contrast to the descriptions that have surfaced about the Columbine shooters. See, e.g., Greg Toppo, *10 Years Later: The Real Story Behind Columbine*, USA TODAY, Apr. 14, 2009, available at http://www.usatoday.com/news/nation/2009-04-13-columbine-myths_N.htm (detailing what we have learned about the Columbine shootings in the ten years since the shooting). The shooters at Columbine were Eric Harris and Dylan Klebold. Harris has been described as "a cold-blooded, predatory psychopath—a smart, charming liar with 'a preposterously grand superiority complex, a revulsion for authority and an excruciating need for control.'" *Id.* (quoting COLUMBINE author Dave Cullen). Klebold, on the other hand, was anxious, depressed, and suicidal. *Id.* His parents, however, seemed to be unaware of his mental state. *Id.* Thus, it is likely he never received any counseling, much less treatment. Cho was diagnosed and received medication, but the content of his writings were not revealed to his family—until after the Virginia Tech shootings. REPORT, *supra* note 19, at 35–36. Cho was no longer receiving any therapy or guidance when he entered college where, less than three years later, he would murder over thirty people. See *id.* at 1 (stating that during Cho's middle school and high school years his parents provided services to address his mental issues); see also Massie, *supra* note 19, at 2 (noting that the support mechanisms students may have received in high school disappear when they begin college); REPORT,

The critical issue as related to the Gun Control Act involves Cho's referrals for treatment while in college. During Cho's third year in college, he began to exhibit more troubling signs in the form of "hostile, even violent writings along with threatening behavior."⁵⁵ Students in one class reduced their own class attendance, noting that "everyone's afraid of [Cho]."⁵⁶ The professor of the class insisted that Cho be removed from her class, and the department head asked the Dean of Student Affairs to have Cho's objectionable writing evaluated psychologically.⁵⁷ Although the writing was "inappropriate and alarming," it was not considered conduct that was "actionable" by the school because it did not, per the Cook Counseling Center's counselor's review, contain a specific "threat."⁵⁸

The head of the English Department did, however, follow up with Cho. In a letter sent prior to their meeting, Cho noted that he "seemed to get more attention than I want (I can just tell by the way people stare at me)."⁵⁹ During their meeting, after repeated requests, Cho finally agreed to talk to a counselor.⁶⁰ The department head agreed to tutor Cho privately to make up for the class he was removed from, and she continued to follow up with the college's Associate Dean and the Dean of Student Affairs.⁶¹ In her follow-up a month later, the department head noted:

[A]ll of his submissions so far have been about shooting or harming people because he's angered by their authority or by their behavior. . . . I have to admit that I'm still very worried about this student. . . . I know he is very angry, however, and

supra note 19, at 1 (noting that during Cho's middle school and high school years his parents provided services to address his mental issues).

⁵⁵ REPORT, *supra* note 19, at 41.

⁵⁶ *Id.* at 42–43.

⁵⁷ *Id.* at 43.

⁵⁸ *Id.*

⁵⁹ *Id.* at 44. This statement strikes the author, who admittedly has the benefit of hindsight, as indicative of anger and paranoia. Although universities have counseling centers and the like, how often are professors and department heads educated about recognizing signs of trouble in students? Considering that so many mental illnesses manifest during those years for students, perhaps schools would be better able to intervene earlier if more education of those who work so closely with students occurred. See, e.g., Kate Kelly, *Lost on the Campus*, TIME, Jan. 6, 2001, available at <http://www.time.com/time/nation/article/0,8599,93991,00.html> (discussing the fact that many college counseling centers are overburdened and do not have the capacity to thoroughly diagnose and treat students).

College can be a breeding ground for psychiatric problems. Poor eating habits, irregular sleeping patterns and experimentation with drugs and alcohol—especially combined with the academic stress of college life—may all play roles in triggering mental problems. Additionally, many of the major psychiatric illnesses, including depression, bipolar disorder, and schizophrenia, often do not manifest themselves until the late teens or early twenties. *Id.*

⁶⁰ REPORT, *supra* note 19, at 44.

⁶¹ *Id.* at 44–45.

I am encouraging him to see a counselor—something he’s resisted so far.⁶²

The professor, however, continued to work with Cho one-on-one; Cho eventually received an A for a grade.⁶³

That November, Cho finally spoke to a counselor—after he was confronted by campus police for bothering a female student.⁶⁴ Cho requested an appointment with a specific psychologist (whom his professor had mentioned), but Cho did not keep that appointment.⁶⁵ He spoke again to the counseling center via phone, but nothing more came of that.⁶⁶ That day, though, another complaint about Cho was made to the campus police.⁶⁷

This time, after the campus police confronted Cho over the new complaints, Cho sent a text message to a suitemate stating, “I might as well kill myself.”⁶⁸ This suicidal ideation was reported to the campus police, and they took Cho to the Virginia Tech Police Department for evaluation.⁶⁹

During this evaluation, a licensed clinical social worker noted that Cho “was mentally ill, was an imminent danger to self or others, and was not willing to be treated voluntarily.”⁷⁰ Cho was referred to St. Albans Behavioral Health Center, a temporary detention order was issued, and

⁶² *Id.* at 45.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 46.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 47.

⁶⁹ *Id.*

⁷⁰ *Id.* The distinction in the Gun Control Act and its interpretation between being voluntarily treated versus involuntarily committed seems to have little relation to the purpose behind the intent of keeping firearms out of the hands of the dangerous mentally ill. If a dangerous person agrees to treatment when persuaded by a family member, for example, that person might be as dangerous years later as the person who had to be involuntarily committed—perhaps because the latter person had no family member involved. The first person may find herself without a support system in the future, unable to recognize on her own the need for treatment. This person could then legally purchase a firearm because her original commitment was voluntary, regardless of how dangerous she had been or is currently. *But see, e.g.,* VA. CODE. ANN. § 18.2-308.1:3(A). Virginia State law appears to try to close this gap by providing for a prohibition against firearm possession even by those voluntarily admitted if they had been subject earlier of a temporary detention order.

It shall be unlawful for any person involuntarily admitted to a facility or ordered to mandatory outpatient treatment pursuant to § 19.2-169.2, involuntarily admitted to a facility or ordered to mandatory outpatient treatment as the result of a commitment hearing pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, or who was the subject of a temporary detention order pursuant to § 37.2-809 and subsequently agreed to voluntary admission pursuant to § 37.2-805 to purchase, possess or transport a firearm.

Id. A gap remains, though, because unless a temporary detention order is originally required this provision would not apply.

Cho was transferred to a psychiatric bed.⁷¹ His admission form indicated that he had no history of violent behavior but that he did have access to a firearm; the accuracy of the latter has not been verified.⁷² He was provided a dosage of the anxiety medication Ativan upon admission, and he met with a clinical psychologist early the following morning.⁷³

Without reviewing any hospital records (unavailable to the evaluator due to the early hour), after a fifteen-minute evaluation, the psychologist found that Cho, although mentally ill, did not present an imminent danger to himself or others.⁷⁴ A psychiatrist also evaluated Cho and recommended outpatient treatment.⁷⁵ This, however, was based in part on Cho's self-report denying any previous issues regarding his mental health.⁷⁶

During the subsequent hearing to determine whether Cho would be committed, the special justice reviewed the written reports completed as a prescreening by the evaluator and by the psychiatrist. Cho also provided evidence.⁷⁷ No other witnesses provided information for the special justice to consider: none of the complaining students, not the campus police officers who initially detained Cho, and not any of the actual evaluators, including the one who believed Cho to be dangerous and needing inpatient care.⁷⁸ In spite of that, the special justice ruled that Cho "present[ed] an imminent danger to himself as a result of mental illness."⁷⁹ The special justice, however, did not commit Cho; he instead ordered Cho to receive outpatient treatment and to "follow all recommended treatments."⁸⁰ Cho

⁷¹ REPORT, *supra* note 19, at 47.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* One cannot help but wonder how thorough a review can be conducted in fifteen minutes and without reference to the records made since arrival at the facility. If these temporary detentions do not qualify as actions prohibiting one from purchasing a firearm, yet the decision not to admit is made with such little information, another failure of the system is apparent. See *infra* notes 209–14 and accompanying text (discussing the lack of due process for temporary or emergency detentions as a reason not to disqualify a person under the Gun Control Act).

⁷⁵ REPORT, *supra* note 19, at 47.

⁷⁶ *Id.* at 48. Privacy laws prevented the psychiatrist from gathering information, and limited resources made gathering other information cost-prohibitive. *Id.* The Panel noted that access to information among agencies was imperative. *Id.* The Panel, however, concluded that a primary impediment to the sharing of information is based on misunderstandings of the Family Educational Rights and Privacy Act of 1974. *Id.* at 65–66, 68.

⁷⁷ *Id.* at 48.

⁷⁸ *Id.*

⁷⁹ *Id.* (internal quotation marks omitted).

⁸⁰ *Id.* Equally disturbing in hindsight, and perhaps more so, is the lingering question of whether, had Cho been admitted from some time at St. Albans, that treatment could have provided Cho with the emotional stability needed to ward off the impending massacre. Of course, we have a great interest in not overreaching when it comes to depriving people of their liberty interest and thus in not civilly committing a person without actual need. But when the oversight of that need leaves thirty-two people dead, maybe we have swung too far on the side of not committing persons. Overt acts and

scheduled an appointment for that afternoon, but he did not return for any follow-up appointments.⁸¹ Because he had been accepted as a voluntary patient, there was no further communication with the Behavioral Health Center or the Virginia Tech campus police.⁸² None of these events were ever communicated to Cho's parents.⁸³

Problems continued the next spring, and in Cho's Fiction Workshop class, Cho submitted a writing eerily predictive of what would occur a year later:

It tells the story of a morning in the life of Bud "who gets out of bed unusually early . . . puts on his black jeans, a strappy black vest with many pockets, a black hat, a large dark sunglasses [sic] and a flimsy jacket. . . ." At school he observed "students strut inside smiling, laughing, embracing each other. . . . A few eyes glance at Bud but without the glint of recognition. I hate this! I hate all these frauds! I hate my life. . . . This is it. . . . This is when you damn people die with me. . . ." He enters the nearly empty halls "and goes to an arbitrary classroom. . . ." Inside "[e]veryone is smiling and laughing as if they're in heaven-on-earth, something magical and enchanting about all the people's intrinsic nature that Bud will never experience." He breaks away and runs to the bathroom. "I can't do this. . . . I have no moral right."⁸⁴

Cho's story ended with Bud encountering a gothic girl to whom Bud says, "I'm nothing. I'm a loser. I can't do anything. I was going to kill every god damn person in this damn school, swear to god I was, but I . . . couldn't."⁸⁵ Several firearms are specifically referenced in the story.⁸⁶ Although the professor of the course reported concerns to the department

dangerousness should continue to be factors in making those determinations. But if we had more involvement of the parties originally invested in the detention—here, Cho's suitemate, the students who alleged harassment, his professors, the campus police—a judge or magistrate facing the incredibly difficult decision to remove someone's liberty could at least do so under a more informed light.

⁸¹ *Id.* at 49.

⁸² *Id.*

⁸³ *Id.* See generally Richard Brusca & Colin Ram, *A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 141, 142–44 (Fall 2010) (examining faculty and administration perceptions of privacy laws as preventing disclosure to Cho's parents or in sharing information with others).

⁸⁴ REPORT, *supra* note 19, at 50 (omissions in original Panel report).

⁸⁵ *Id.* (omission in original).

⁸⁶ See *id.* (referencing "two hand guns, and a sawed off shotgun," as well as an ".8 caliber automatic rifle and a M16 machine gun").

head, the professor decided to "just deal with him."⁸⁷ He scheduled two meetings, but Cho appeared for neither of them.⁸⁸

Cho's behavior continued to reveal "disturbing themes" over the next year.⁸⁹ Classmates in a Fall 2006 class reported after the shooting that they had, that fall, joked "that they were waiting for Cho to do something. One student reportedly had told a friend that Cho 'was the kind of guy who might go on a rampage killing.'"⁹⁰

In Spring 2007, Cho began to buy guns and ammunition.⁹¹ He did so despite having been adjudicated as a mental defect, that is, as dangerous due to mental illness. Cho used only two firearms during his shooting rampage in April 2007.⁹² With a Virginia law limiting handgun purchases to only one per thirty-day timeframe, Cho spaced his purchases, buying a Walther P22 .22 caliber semiautomatic handgun on February 9, 2007, then a Glock 19 9-mm semiautomatic handgun on March 13, 2007.⁹³ He bought five ten-round magazines, several fifteen-round magazines, and practice ammunition over a ten-day timeframe in March 2007.⁹⁴ He had almost 400 bullets when he began his killing spree.⁹⁵

2. Other Examples

Suffering from a twenty-year history of mental illness, Russell Weston shot and killed two police officers at the United States Capitol on July 24, 1998.⁹⁶ Weston said his actions were intended to "prevent the United States from being annihilated by disease and legions of cannibals."⁹⁷ Weston had been involuntarily hospitalized and involuntarily medicated,⁹⁸ yet he purchased firearms from an Illinois store.⁹⁹ The State of Montana, it

⁸⁷ *Id.* at 49.

⁸⁸ *Id.* The professor initially did not reveal the writing quoted here to the panel. *Id.* at 50. Further inquiry had to be made; that inquiry was prompted by a reporter's questioning. *Id.*

⁸⁹ *Id.* at 49.

⁹⁰ *Id.* at 51.

⁹¹ *Id.* at 52.

⁹² *Id.* at 71.

⁹³ *Id.*

⁹⁴ *Id.* at 74.

⁹⁵ *Id.*

⁹⁶ *Capitol Hill Slaying Suspect Is Charged*, N.Y. TIMES, Oct. 11, 1998, at 1-33.

⁹⁷ Bill Miller, *Capitol Shooter's Mind-Set Detailed*, WASH. POST, Apr. 23, 1999, at A1, available at <http://www.washingtonpost.com/wp-srv/national/longterm/shooting/stories/weston042399.htm>.

⁹⁸ Sally Satel, *Crazed and Confused: A Murder Defendant Is Forced to Choose Between the Death Penalty and Permanent Madness*, SLATE (Aug. 30, 2001, 3:00 AM), http://www.slate.com/articles/health_and_science/medical_examiner/2001/08/crazed_and_confused.html.

⁹⁹ Marilyn Price & Donna M. Norris, *National Instant Criminal Background Check Improvement Act: Implications for Persons with Mental Illness*, 36 J. AM. ACAD. PSYCHIATRY & L. 123, 124 (2008).

seems, never reported his commitment.¹⁰⁰ The two police officers he shot might be alive had the requisite information been reported. This, of course, means that the federal firearms licensee (FFL) and the victims are dependent on a reporting system that has never been shown to be reliable.¹⁰¹

Similarly, after a long history of psychiatric disorders, Lisa Duy, responding to the voices she heard, purchased a 9-mm semiautomatic handgun from an FFL in Utah after her background check revealed no disqualifiers.¹⁰² Two hours later, she took that gun and opened fire at a local television station where she believed, due to her delusions, information was being broadcast about her sex life.¹⁰³ Duy had been involuntarily committed by a judge just one year before she purchased her gun.¹⁰⁴

These examples illustrate deficiencies in the reporting requirements for the NICS.¹⁰⁵ The incidents involving Loughner and Holmes highlight an equally worrisome hole in the net used by the Gun Control Act to try to keep firearms out of the hands of the dangerously mentally ill—or, as the Gun Control Act (possibly) calls them, the mentally defective.¹⁰⁶

¹⁰⁰ *Id.* Weston has been held since 1998, incompetent for trial, and he has been forcibly medicated since 2002. *United States v. Weston*, 326 F. Supp. 2d 64, 65, 67 (D.D.C. 2004).

¹⁰¹ *See, e.g., infra* Part III (discussing the failures of the NICS system and the need for the NICS Improvement Act).

¹⁰² Fox Butterfield, *Hole in Gun Control Law Lets Mentally Ill Through*, N.Y. TIMES, Apr. 11, 2000, at A1 (focusing on the privacy issues that prevented information from being conveyed to the NICS).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See infra* Part III.A and notes 138–46 and accompanying text (explaining how the NICS required information to be submitted regarding mental defective/committed to a mental institution).

¹⁰⁶ Other tragedies occur when those with apparent mental illness possess guns—also possibly in violation of the Gun Control Act. On October 12, 2011, Scott Evans Dekraai walked into a beauty salon in Orange County, California, carrying three handguns (a 9-mm Springfield, Smith & Wesson, a .44 Magnum, and a .45 Heckler & Koch), and subsequently opened fire. Press Release, Orange County District Attorney, *District Attorney to Seek Death Penalty Against Seal Beach Salon Shooter for Largest Mass Murder in Orange County History* (Oct. 14, 2011), available at <http://www.orangecountyda.com/home/index.asp?page=8&recordid=2617>. His ex-wife, with whom he was in a custody battle, was his first target. *Id.* But he continued shooting, killing eight and critically injuring a ninth person. Some say that Dekraai “snapped,” but as his story unfolded, the signs of his disturbance became evident. Nancy Dillon & Bill Hutchinson, *Salon Massacre: Prosecutors Seek Death Penalty for Scott Dekraai, for Murder of Ex-Wife, 7 Others*, N.Y. DAILY NEWS (Oct. 14, 2011), http://articles.nydailynews.com/2011-10-14/news/30299545_1_murder-victims-salon-massacre-lucia-bernice-kondas. Of course, those signs were not considered until *after* eight people lost their lives. It was discovered that Dekraai suffered from post-traumatic stress disorder following a boating accident in which a coworker was killed and Dekraai was left permanently disabled. *Id.*; *see also* Elizabeth Flock, *Seal Beach Shooter, Scott Evans De Kraai, Was Angry Because He Thought He’d Lose His Son*, WASH. POST (Oct. 13, 2011), http://www.washingtonpost.com/blogs/blogpost/post/seal-beach-calif-shooter-scott-evans-de-kraai-was-angry-because-he-thought-hed-lose-his-son/2011/10/13/gIQUAU3MPHL_blog.html (recounting the 2007 death of Dekraai’s twenty-six year old coworker, Piper Cameron). Less than two weeks after the shooting, Dekraai’s attorneys requested anti-

III. GUN CONTROL LAWS¹⁰⁷

A. Congressional Gun Control for Persons with Mental Illness

Gun control has been pieced together almost always after a tragic event takes or threatens to take the lives of either many people—such as with the Virginia Tech shootings—or of someone with notoriety—such as Dr. Martin Luther King Jr. or President Ronald Reagan.¹⁰⁸ After these shootings, the public outcry for change has been loud. At times, Congress has capitalized on the opportunity to bring about changes.¹⁰⁹ People who lean toward the far side of gun *control*, wanting no guns in the United States, make some strides after such tragic events, and often at such times,

psychotic medication for him. Matt Coker, *6 Women and 2 Men, OC Homicides Nos. 45–52: Massacred at Beauty Salon*, OC WKLY. (Oct. 24, 2011, 3:05 PM), http://blogs.ocweekly.com/navelgazing/2011/10/hair_salon_seal_beach_shooting.php. No reports have been found regarding how Dekraai came into possession of his firearms.

During the final stages of writing this Article, the tragic shooting in Newtown, Connecticut took place during which twenty-eight people died, including twenty elementary-school children, six school staff members, the gunman's mother, and the gunman, Adam Lanza. See Tamer El-Ghobashy & Devlin Barrett, *Dozens Killed in Conn. School Shooting*, WSJ.COM (Dec. 17, 2012), <http://online.wsj.com/article/SB10001424127887323297104578179271453737596.html>. The reasons for the shooting are currently unknown. Lanza, however, did not purchase his firearms; they reportedly belonged to his mother, who was also found dead, allegedly shot by Lanza. See Pierre Thomas et al, *Connecticut School Shooting: Adam Lanza and Mother Visited Gun Ranges*, Abc News (Dec. 16, 2012), <http://abcnews.go.com/Blotter/connecticut-school-shooting-adam-lanza-mother-visited-gun/story?id=17992396>. Thus, although horrific and tragic, the issues involved in the Newtown shooting are not the same as addressed in this Article. Interestingly, though, this shooting appears to have been a bigger impetus to reopening discussions of gun control and legislation, namely as addressing assault weapons. See, e.g., David Jackson, *Obama to Gun Control Petitioners: "We Hear You,"* USA TODAY (Dec. 21, 2012), <http://www.usatoday.com/story/news/politics/2012/12/21/obama-newtown-gun-control-white-house-petitioners/1783861/>. Although Lanza does not appear to have purchased his firearms, much of the discussion has been regarding mental illness as related to mass shootings and access to firearms. See *id.*

¹⁰⁷ Much of the information in this Section originally appeared also as background information in Jana R. McCreary, *Falling Between the Atkins and Heller Cracks: Intellectual Disabilities and Firearms*, 15 CHAP. L. REV. 271, 276–80 (2011).

¹⁰⁸ See also Jackson, *supra* note 106. But scholars note that the piecemeal approach to gun legislation should be replaced with a comprehensive reform. See, e.g., Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 568 (2008) [hereinafter Rostron, *Incrementalism*] ("Reasonable efforts should be made to reduce gun violence, but those efforts should push toward a comprehensive and cohesive pattern of controls, rather than a crazy quilt of inconsistent and incomplete measures."). Filling the gaps that allow the dangerously mentally ill to purchase firearms should be part of that reform.

¹⁰⁹ See, e.g., ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 141 (3d ed. 2004). However, it appears no changes are coming about in direct response to the Arizona or Colorado shootings. See, e.g., Tom Cohen, *Candidates Show Little Appetite for New Gun Control Laws*, CNN (Jul. 26, 2012, 7:22 PM), <http://www.cnn.com/2012/07/26/politics/gun-control-debate/index.html?iref=allsearch>. The article proceeds to discuss presidential candidate, Mitt Romney: "The real point, [Romney] said, is to prevent people who are 'deranged and distressed' from 'carrying out terrible acts,' noting that Oklahoma City bomber Timothy McVeigh used fertilizer to make the explosives for the attack that killed 168 people in 1995." *Id.*

even those on the far side of wanting broad gun *rights* admit that the measures are reasonable.¹¹⁰ But the piecemeal approach and continued push for broad gun rights leave gaps.

Such reactionary legislation began with the National Firearms Act in 1934,¹¹¹ which was predominantly prompted due to concerns of gangsters and organized crime.¹¹² Then in 1968, in the wake of assassinations of Dr. Martin Luther King Jr. and Senator Robert Kennedy, Congress passed the Gun Control Act.¹¹³ The Gun Control Act sought to restrict firearms possession, prohibiting certain special risk groups from possessing guns and prohibiting the transfer of guns to such groups by licensed dealers.¹¹⁴ The Gun Control Act addresses this in two provisions, first, stating, “It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or has been committed to any mental institution.”¹¹⁵ The second provision states:

It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or

¹¹⁰ See, e.g., *Senate Passes NICS Improvement Act, House Concurs*, NRA-ILA (Dec. 19, 2007), <http://nra.org/news-issues/news-from-nra-ila/2007/senate-passes-nics-improvement-act-hou.aspx?s=> (“The NICS Improvements Act . . . [r]equires all federal agencies that impose mental health adjudications or commitments to provide a process for ‘relief from disabilities.’ Extreme anti-gun groups like the Violence Policy Center and Coalition to Stop Gun Violence have expressed ‘strong concerns’ over this aspect of the bill—surely a sign that it represents progress for gun ownership rights.”). It is interesting how the NRA decides that legislation must be good for gun rights advocates based on opposition by gun control advocates. See Price & Norris, *supra* note 99, at 125 (noting that the NICS Improvement Act was passed by both the House of Representatives and the Senate with the public support of the NRA).

¹¹¹ 26 U.S.C. §§ 5801–72 (2006).

¹¹² See Zimring, *supra* note 9, at 138 (“The National Firearms Act of 1934, after the handgun registration provisions were deleted, was a concentrated attack on civilian ownership of machine guns, sawed-off shotguns, silencers, and other relatively rare firearms that had acquired reputations as gangster weapons during the years preceding its passage.”).

¹¹³ Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–28 (2006) and in scattered sections of 26 U.S.C. (2006)); Amy Bingham, *Shootings That Shaped Gun Control Laws*, ABC NEWS (July 27, 2012), <http://abcnews.go.com/Politics/OTUS/shootings-shaped-gun-control/story?id=16863844#.UHy1T2i6VUQ>.

¹¹⁴ Zimring, *supra* note 9, at 149.

¹¹⁵ 18 U.S.C. § 922(d)(4) (2006). Other prohibitions include the ability to sell firearms to one who has been convicted of a felony, dishonorably discharged from the Armed Forces, or has been convicted of a misdemeanor crime of domestic violence. *Id.* § 922(g)(1), (6), (9). Congress couches its prohibitions under commerce restrictions; however, the Supreme Court held that Congress exceeded its Commerce Clause authority in enacting the Gun-Free School Zones Act of 1990. See *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding 18 U.S.C. § 922(q)(1) unconstitutional because it is a “criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”).

foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.¹¹⁶

Together, these provisions bar selling firearms to someone who has been "adjudicated as a mental defective or has been committed to any mental institution"¹¹⁷ and bar such persons from possessing firearms.¹¹⁸

To simply state that one may not sell a firearm to a person in this identified special risk population meant very little: the ban was not strengthened with any means of verification for any group other than minors. After all, a purchaser merely needed to state he or she was eligible, and the dealer was able to rely on her word.¹¹⁹ The Gun Control Act, thus, had holes.

Congress acted with an eye toward patching some of the holes when it enacted, after debating for seven years, the Firearms Owners' Protection

¹¹⁶ 18 U.S.C. §§ 922(g)(4), (9) (2006). Although the *Lopez* Court held that the Gun-Free School Zones Act was unconstitutional, some circuits have upheld subsequent constitutional challenges to this legislation because it contained a "jurisdictional" clause. *United States v. Dorsey*, 418 F.3d 1038, 1045–46 (9th Cir. 2005). Interestingly, despite the Court finding Congress does not generally have the power to regulate guns, the Court has been willing to find that Congress has the authority to regulate drugs. *See Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (Scalia, J., concurring) (recognizing that Congress has the authority to regulate controlled substances under the Commerce Clause).

States use a variety of terms to discuss mental impairment in gun legislation. The District of Columbia prohibits the sale of firearms to persons whom the seller "has reasonable cause to believe is not of sound mind" or who is under the age of twenty-one. D.C. CODE § 22-4507 (LexisNexis 2001). Alabama prohibits the delivery of a pistol to a person "of unsound mind." ALA. CODE § 13A-11-76 (LexisNexis 2005). California bans firearm possession by (and transfer to) persons adjudicated as "a danger to others as a result of a mental disorder or mental illness, or who has been adjudicated to be a mentally disordered sex offender." CAL. WELF. & INST. CODE § 8103(a)(1) (West 2010). Key in California is Section 8103 of its Welfare and Institutions Code. Under this Section, persons who have "been placed under conservatorship by a court . . . because the person is gravely disabled as a result of a mental disorder or impairment by chronic alcoholism" may not possess a firearm. *Id.* § 8103(e)(1). Further, Section 8101 states that no one shall "knowingly supply, sell, give, or allow possession or control of a firearm," to anyone covered in Section 8103, violation of which is subject to a two-to-four-year prison sentence. *Id.* § 8101(b). However, California appellate courts have stated that a person who is "capable of surviving safely in freedom with the help of willing and responsible family members, friends, or third parties" is not gravely disabled and may still own a firearm. *San Diego Cnty. Dep't of Soc. Serv. v. Neal (In re Conservatorship of Neal)*, 235 Cal. Rptr. 577, 578 (Ct. App. 1987) (quoting *Estate of Davis v. Treharne (In re Conservatorship of Davis)*, 177 Cal. Rptr. 369, 374 (Ct. App. 1981)). Further, the Welfare and Institutions Code specifically states that "'gravely disabled' does not include mentally retarded persons by reason of being mentally retarded alone." CAL. WELF. & INST. CODE § 5008(h)(3) (West 2010).

¹¹⁷ For an analysis of the difference between the terms "adjudicated as mentally defective" and "committed to any mental institution," see McCreary, *supra* note 107, at 285–88.

¹¹⁸ Thus, even though the examples above in Part ILC. do not fall under the problems for whether they could be sold a firearm, such persons were clearly prohibited from possessing a firearm. Anyone in their lives should have been aware of the danger. *Supra* notes 97–113 and accompanying text.

¹¹⁹ Zimring, *supra* note 9, at 152–53; *supra* notes 97–113 and accompanying text.

Act (FOPA) of 1986.¹²⁰ FOPA attempted to clarify the types of persons prohibited from purchasing or possessing firearms under the Gun Control Act.¹²¹ Before FOPA, the Gun Control Act addressed persons who may have a dangerous mental illness under two titles: “Title VII prohibited a person whom a court had ever adjudged mentally incompetent from purchasing or possessing a firearm, while Title IV disqualified individuals who had ever been: (1) adjudicated as a mental defective; or (2) committed to an institution on account of mental illness.”¹²² However, even though the two titles were merged with FOPA, the prohibited person—here, that person adjudicated as a mental defective—still had to “police his own eligibility.”¹²³

In the interim, as FOPA was being debated, John Hinkley Jr. attempted to assassinate President Ronald Reagan in 1981.¹²⁴ Hinkley was acquitted for that crime through a successful plea of not guilty by reason of insanity.¹²⁵ But this was just the sort of shooting with notoriety that was needed to further deepen the gun control legislation. Seven years later, and through legislative battles that lasted all that time,¹²⁶ Congress reacted with

¹²⁰ Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended in scattered sections of 18 U.S.C. §§ 922–30 (2000)).

¹²¹ James B. Jacobs & Jennifer Jones, *Keeping Firearms out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388, 391 (2011).

¹²² *Id.* at 390.

¹²³ *Id.* at 391. With respect to FOPA, scholarly author David T. Hardy noted, “A redefinition of other ‘prohibited person’ categories is long overdue. FOPA’s passage, by re-enacting the categories dealing with mental adjudications, may be taken to accept prior narrow interpretations of these terms, but it sheds little light on the status of convictions in court-martials.” *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 642 (1986). In a footnote, Hardy continued:

This narrowing construction reduces but does not obviate the need for a careful redraft of this category. “Mental incompetence,” “mental defect” and orders of “commitment” may have little meaning in relation to the Congressional findings that possession of firearms by “mental incompetents” burdens interstate commerce, threatens the life of the President, impedes free speech and practice of religion, and is “a threat to the continued and effective operation of the Government” Drafters of a revised criterion should bear in mind that the Supreme Court, while refusing to treat the mentally ill as a “suspect category,” appears more than willing to strike down burdens upon them which have no rational basis, and appears unwilling to “stretch the record” to find a rationale. Future drafters should also note that, while it is permissible to infer a continuing illness from the initial adjudication, many persons may have records of treatment or adjudication that antedate due process guarantees imposed by the Court.

Id. at n.314 (citations omitted).

This Article attempts to pick up from that need and begin to reopen the discussion on redrafting this category. Issues of due process, as Hardy notes, will need to be tackled in the future, deeper conversations in order to be addressed in such a full redraft. *Id.* at 589.

¹²⁴ SPITZER, *supra* note 109, at 126.

¹²⁵ Andrew Chow, *Reagan Shooter Hinckley Aiming for Freedom*, FINDLAW (Nov. 30, 2011, 9:14 AM), <http://blogs.findlaw.com/blotter/2011/11/reagan-shooter-hinckley-aiming-for-freedom.html>.

¹²⁶ SPITZER, *supra* note 109, at 126.

the Brady Bill in 1993.¹²⁷ The Brady Bill attempted to address a hole in the Gun Control Act by implementing a waiting period before the purchase of a handgun and by establishing a national background system check that would provide information to FFLs about persons not qualified under the Gun Control Act to purchase a firearm.¹²⁸

This law was implemented in two stages. First, it established a five-day waiting period during which time local chief law enforcement officers (CLEOs) were to conduct background checks, giving states time to gather the records and time to institute the computerized system to maintain those records.¹²⁹ Then, by 1998, the NICS was to have been available for access by FFLs. The FFLs were to be able to use the NICS to determine if a person was eligible under the Gun Control Act to purchase a firearm.¹³⁰

The Brady Bill, however, did not seem to account for how it would motivate states to provide information related to those classified as "mental defectives."¹³¹ In 2007, for example, only twenty-two states provided any

¹²⁷ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2006)). Congress also responded to Hinckley's acquittal with the Insanity Defense Reform Act in 1984. Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. § 17). See also, Michael L. Perlin, "The Borderline Which Separated You from Me": *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1376, 1380–82 (1997) (discussing the Hinckley case, Hinckley's acquittal, and the legislative battle that took place throughout).

¹²⁸ Brady Handgun Violence Prevention Act § 102–03.

¹²⁹ *Id.* Cognizant of privacy concerns, actual mental health information need not be disclosed. Instead, a state could opt to instead include a person on the Denied Persons File list of the NICS. See Press Release, Fed. Bureau of Investigation, *Response to Inquiries on the FBI's National Instant Criminal Background Check System* (Apr. 19, 2007), available at <http://www.fbi.gov/news/pressrel/press-releases/response-to-inquiries-on-the-fbis-national-instant-criminal-background-check-system> (describing that "[i]f state legislation or privacy laws prohibit the sharing of mental health information, states can provide information for inclusion in the Denied Persons File of NICS with no specifics on the mental health issue").

¹³⁰ The provision requiring CLEOs to perform background checks was determined to be in violation of the Eleventh Amendment. *Printz v. United States*, 521 U.S. 898, 933 (1997). However, by that time, the CLEOs continued to provide background information on their own, without a federal mandate. The NICS was available shortly thereafter. *National Instant Criminal Background Check System*, FBI, <http://www.fbi.gov/about-us/cjis/nics> (last visited Sept. 24, 2012) (stating that the FBI launched NICS on November 30, 1998).

¹³¹ Regrettably, information regarding this area of the Gun Control Act and the special risk population is saturated with the term "mental defective" used to describe persons who fail to qualify under the Gun Control Act to purchase a firearm. Gun Control Act, 18 U.S.C. §§ 922(d)(4), (g)(4), (s)(3)(B)(iv) (2006). It appears this is a direct result of the language choice in 1968, "adjudicated as a mental defective or has been committed to any mental institution." *Id.* Unfortunately, the coining of this term as a catchall phrase has led to its use by those debating the area and the government. See, e.g., Marcia Purse, *Perspective on Guns and Mental Illness*, ABOUT.COM (Sept. 17, 2011), http://bipolar.about.com/od/stigma/a/070616_lapierre.htm (describing an interview with the Chief Executive Officer of the National Rifle Association, wherein he referred to the "mentally defective" as a class of persons with whom the NRA did not support having ownership of guns). Ms. Purse is a writer for the About Bipolar Disorder website. In *Perspectives on Guns and Mental Illness*, she quotes

information on mental health records.¹³² It would be fifteen years after the Brady Bill's enactment before any attempt was successful in trying to strengthen the meaning behind the Brady Bill regarding this special-risk group.¹³³

That improvement to the Brady Bill came after the shooting at Virginia Tech.¹³⁴ After that shooting, the Virginia Tech Review Panel included in its recommendations that states needed to report information "necessary to conduct federal background checks on gun purchases"¹³⁵ Shortly after, Congress passed the National Instant Check System Improvement

a reader who wrote to Ms. Purse to complain about how Wayne LaPierre, Chief Executive Officer of the National Rifle Association, had talked about the NICS during an interview on *CBS This Morning*:

That being said, I *do* have a diagnosis of [Bipolar Disorder], and from what Mr. LaPierre was saying, *I am mentally defective*. I flinched every time he said it, and he said it with gusto at least ten times in the course of the interview. He never said mentally ill, only mentally defective, mentally defective, mentally defective. And people wonder why so many of us "mentally defective" people feel we are stigmatized.

Id. Continuing the use of a term over forty years old ignores the strides made in recognizing the importance of people and people-first language. See generally Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 373–76 (1992) (arguing that the use of stereotypes, coined "sanisms," is found detrimentally throughout the jurisprudence and lawyering practices of the United States); see also *People First Language—Describing People with Disabilities*, TEX. COUNCIL FOR DEVELOPMENTAL DISABILITIES, <http://www.txddc.state.tx.us/resources/publications/pfanguge.asp> (last revised Dec. 2011) (describing common stereotypes used to refer to individuals with disabilities and advocating for change in these misrepresentations).

¹³² Press Release, *supra* note 129.

¹³³ In the interim, other gun control legislation passed, including the controversial federal assault weapons ban, which subsequently expired in 2004. Public Safety and Recreational Firearms Use Protection Act, Pub. L. No 103-322, 108 Stat. 1796, 1996 (1994) (repealed 2004). Whether a renewed assault weapons ban would survive constitutional scrutiny under *Heller* is debatable. It has been concluded that the type of arm possessed can indeed be regulated, and if the arm is not in "common use at the time" among Americans, the arm is not protected under the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)); see also Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 388 (2009) [hereinafter Rostron, *Protecting*] (describing that "the government can ban machine guns, not because they pose a particularly serious threat to public safety, but because . . . they are not in common use among civilians").

¹³⁴ See OFFICE OF THE INSPECTOR GEN. FOR MENTAL HEALTH, MENTAL RETARDATION & SUBSTANCE ABUSE SERVS., INVESTIGATION OF APRIL 16, 2007 CRITICAL INCIDENT AT VIRGINIA TECH 3, available at <http://www.oig.virginia.gov/documents/VATechRpt-140.pdf> [hereinafter INVESTIGATION] (describing the authority of the Office of the Inspector General to provide "policy and operational recommendations . . . to prevent problems, abuses, and deficiencies in and improve the effectiveness of programs and services" in response to the shootings at Virginia Tech). Gun control legislation often follows shootings that gain national recognition. See, e.g., Rostron, *Incrementalism*, *supra* note 108, at 561–62 (describing surges of gun legislation following prominent tragedies, including the enactment of gun legislation in response to the Columbine and Virginia Tech school shootings); see also *supra* Part II.A (describing the tragedy at Virginia Tech by shooter Seung Hui Cho).

¹³⁵ REPORT, *supra* note 19, at 76.

Amendments Act (NICS Improvement Act).¹³⁶ The NICS Improvement Act was intended to strengthen the Brady Bill's background check system through the NICS.¹³⁷

As part of the desired improvement, Congress sought to increase the availability of information that would result in disqualification of gun ownership by automating the information related to mental illness.¹³⁸ That access could be automated, or at least improved, if the information were computerized.¹³⁹ The NICS Improvement Act required that federal agencies with information related to a person falling under the categories of prohibited possessors¹⁴⁰ report that information to the Attorney General at least quarterly.¹⁴¹ The Attorney General was then charged with updating the NICS.¹⁴² Further, states were to make similar information available when a person was adjudicated as a mental defective.¹⁴³ Federal funds

¹³⁶ NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008).

¹³⁷ *Id.* § 2, 121 Stat. at 2559–60. Of course, regulations can cover only those who are required to abide by them. Not covered by the Gun Control Act or the NICS Improvement Amendment Act are private sales of firearms to persons. See Rostron, *Incrementalism*, *supra* note 108, at 556 (stating that “[f]ederal law requires background checks only for sales of guns by licensed dealers engaged in the business of selling firearms”). While gun possession itself is prohibited for persons adjudicated mentally defective, the transfer of the gun is not prohibited so long as that transfer is done by a private individual who is not engaged in the business of selling firearms. See *id.* (discussing that an individual who fails a background check at a gun store may instead purchase from “a friend, co-worker, neighbor, a stranger on the street, at a gun show, or through a classified ad in the local newspaper”). Some states, such as California and Pennsylvania, have implemented the background-check requirement for all transfers. *Id.* Some have estimated that half of all gun sales involve used guns, and thus are likely not covered by the required background checks. See Philip J. Cook, Stephanie Molliconi & Thomas B. Cole, *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 69–70 (1995) (finding data supportive of the conclusions that approximately half of all gun sales involve used guns and that approximately forty percent occur in secondary markets rather than in regulated markets).

¹³⁸ See NICS Improvement Amendments Act of 2007, § 102(c)(3), 121 Stat. at 2566–67 (requiring that the states submit names and other relevant identifying information concerning individuals who have been adjudicated as a mental defective or committed to a mental institution to the NICS); see also Associated Press, *Mental Health Records Not in Gun Database*, NBC NEWS (Nov. 26, 2005, 10:08 PM), http://www.msnbc.msn.com/id/10214838/ns/us_news-crime_and_courts/ (describing the legislation that would mandate the sharing of mental health records and require states to improve their computerized record-keeping of those individuals who are barred from purchasing guns). Some complained that prohibiting gun possession by persons with mental illness was unfair in that it denied their rights based on a medical condition. *Id.* Although Justice Scalia, writing for the majority in *Heller*, seemed to dismiss any question of constitutionality of this prohibition, it certainly has not been analyzed as a distinct issue. See *Heller*, 554 U.S. at 626 (discussing that the question of constitutional objections to firearms regulations has not presented itself to the Court). The NRA, however, supported the NICS Improvement Act and negotiated for a release from a disabilities provision, which was subsequently included. Rostron, *Incrementalism*, *supra* note 108, at 555.

¹³⁹ NICS Improvement Amendments Act of 2007, § 2(6), 121 Stat. at 2560.

¹⁴⁰ This applies to persons listed under 18 U.S.C. §§ 922 (g) and (n). NICS Improvement Amendments Act of 2007, § 101, 121 Stat. at 2561.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* § 102, 121 Stat. at 2566–67.

could be withheld from states that failed to comply.¹⁴⁴ States were to be provided grants to assist with the cost of upgrading their information—creating electronic systems, and collecting and analyzing data.¹⁴⁵ Failure to comply was to result in loss of funds as allocated under the Crime Control and Safe Streets Act of 1968.¹⁴⁶ The initial review period to determine compliance would not begin until 2011; that review would extend for two years.¹⁴⁷

The deadline to comply with the NICS Improvement Act has come and gone, and in spite of the threat of losing federal funds, not all states are complying.¹⁴⁸ In February 2011, a month after the compliance deadline passed, nine states had provided no information,¹⁴⁹ and seventeen other states had sent fewer than twenty-five names.¹⁵⁰ Surely, those states had more than twenty-five persons who have been adjudicated as mental defects.¹⁵¹ Moreover, the percentage of denials based on having been adjudicated as a mental defective or committed to a mental institution could easily be interpreted as a lack of those records—rather than as a lack of persons thereby ineligible attempting to purchase firearms. The chart in the Appendix hereto shows the number of denials that were based on mental health issues as compared to all denials.¹⁵² This number, of course, does not include those persons such as Seung Hui Cho, Russell Weston,

¹⁴⁴ *Id.* at 2565.

¹⁴⁵ *Id.* § 103, 121 Stat. at 2567.

¹⁴⁶ *Id.* § 104, 121 Stat. at 2569.

¹⁴⁷ *Id.*

¹⁴⁸ Greg Bluestein, *Most U.S. States Don't Follow Mental Illness Gun Law*, HUFFINGTON POST (Feb. 17, 2011, 2:04 PM), http://www.huffingtonpost.com/2011/02/17/few-states-follow-mental-_n_824738.html.

¹⁴⁹ *Id.* Problems with the distribution of promised funds and with privacy laws were cited as roadblocks to the information being submitted by the states. *Id.* “As of October 30, 2011, the number of records maintained in the NICS Index Mental Defective File totaled 1.3 million. A significant percentage of these records, however, are from a small number of states.” *The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement: Senate Judiciary Committee, Subcommittee on Crime and Terrorism* (Nov. 15, 2011) (statement of Asst. Dir. David Cuthbertson, Asst. Dir., Criminal Justice Information Services Division of the FBI), *available at* <http://www.fbi.gov/news/testimony/the-fix-gun-checks-act-better-state-and-federal-compliance-smarter-enforcement>.

¹⁵⁰ *Id.*

¹⁵¹ Looking at the records for more than eleven years, the NICS has reported 6103 denials due to prohibitions based on mental health issues or adjudications. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) OPERATIONS 2010 13 (2010), *available at* <http://www.fbi.gov/about-us/cjis/nics/reports/2010-operations-report/2010-operations-report-pdf>.

¹⁵² The total denials between November 30, 1998 and January 31, 2012 were 905,616, and only 0.89% of those were due to issues as related to “Adjudicated Mental Health.” DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, FEDERAL DENIALS: WHY THE NICS SECTION DENIES, *available at* <http://www.fbi.gov/about-us/cjis/nics/reports/020212denials-1.pdf.pdf> (last visited Oct. 2, 2012); *infra* Appendix at p. 864.

and Lisa Duy who were ineligible to purchase guns but who passed the background check and thus were not denied purchase.¹⁵³

In passing the NICS Improvement Act, Congress referenced the Virginia Tech shooting as an impetus to the legislation's enactment:

On April 16, 2007, a student with a history of mental illness at the Virginia Polytechnic Institute and State University shot to death 32 students and faculty members, wounded 17 more, and then took his own life. The shooting, the deadliest campus shooting in United States history, renewed the need to improve information-sharing that would enable Federal and State law enforcement agencies to conduct complete background checks on potential firearms purchasers. In spite of a proven history of mental illness, the shooter was able to purchase the two firearms used in the shooting. Improved coordination between State and Federal authorities could have ensured that the shooter's disqualifying mental health information was available to NICS.¹⁵⁴

In discussing the findings and definitions, the focus regarding the inadequate data was on "mental health" and mental illnesses.¹⁵⁵ However, even with that discussion, no clear definitions or explanations were put forth regarding what it meant to have been adjudicated or what was meant by being committed to a mental health facility. This, of course, is what the Virginia Tech Review Panel seemed to blame for Cho's firearm purchase.¹⁵⁶ Thus, the law as it exists today—with the Gun Control Act amended by the Brady Bill and amended again by the NICS Improvement Act—remains unclear. And that lack of clarity could lead to more tragedies.¹⁵⁷

Knowing the issues, the Government Accountability Office conducted a study assessing the success of the NICS Improvement Act, reporting its

¹⁵³ Price & Norris, *supra* note 99, at 124.

¹⁵⁴ NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 2(9), 121 Stat. 2559, 2559–60 (2008).

¹⁵⁵ *Id.* § 2, 121 Stat. at 2560.

¹⁵⁶ INVESTIGATION, *supra* note 134, at 71–73.

¹⁵⁷ Of course, regulations can cover only those who are required to abide by them. Not covered by the Gun Control Act or the NICS Improvement Amendment Act are private sales of firearms to persons. Rostron, *Incrementalism*, *supra* note 108, at 556. While gun possession itself is prohibited for persons adjudicated mentally defective, the transfer of the gun is not prohibited so long as that transfer is done by a private individual who is not engaged in the business of selling firearms. *Id.* Some states, such as California and Pennsylvania, have implemented the background-check requirement for all transfers. *Id.* Some have estimated that half of all gun sales in California involve used guns, and thus are likely not covered by the required background checks. See Philip J. Cook, Stephanie Molliconi & Thomas B. Cole, *Regulating Gun Markets*, 86 J. CRIM. L. & CRIMINOLOGY 59, 69–70 (1995) (finding data supportive of the conclusions that approximately half of all gun sales involve used guns and that approximately forty percent occur in secondary markets rather than in regulated markets).

findings in July 2012.¹⁵⁸ The improvements of twelve states created the biggest impact on the statistics, but more than half of the states had increased their number of reported prohibited persons under this category by fewer than one hundred.¹⁵⁹ The threatened penalties by the Department of Justice have never been imposed.¹⁶⁰

Seung Hui Cho's adjudication had not been reported and thus was not available during a background check. Russell Weston and Lisa Duy also slipped through the cracks and their disqualifying issues appeared not to have been reported. But as previously noted, reporting was not necessarily the problem with Jared Lee Loughner or James E. Holmes. Neither had reached the point of commitment. One problem leading to this is the Gun Control Act language and its far too broad interpretation.

B. *Interpretations of the Gun Control Act Language*

When the Gun Control Act was passed, debate took place regarding who should be, as a matter of law, prohibited from possessing firearms. On the surface, it is easy to read the plain language in the Gun Control Act, prohibiting possession by or transfer to persons who have been "adjudicated as a mental defective or committed to a mental institution."¹⁶¹ However, what that language means is unclear. Moreover, some jurisdictions disagree on the understanding of exactly who should be considered as falling within this category, leaving some states more vulnerable to incidents such as what happened that January day in Tucson and that July day in Aurora, Colorado.

The narrowing of populations eligible to purchase or possess a firearm became one of the major objectives of the Gun Control Act, denying specific populations access to firearms—felons, minors, and "persons who had been adjudicated as mental defectives or committed to mental institutions."¹⁶² The goal was to deny access to firearms to these "special risk groups" or, at the very least, punish those who provided such access.¹⁶³ The Gun Control Act barred the knowing transfer of guns or ammunition to the named groups.¹⁶⁴ The Gun Control Act achieved this task easily with some groups: determining who is a minor is as easy as seeing proof of

¹⁵⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-684, GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS (2012), *available at* <http://www.gao.gov/assets/600/592452.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 18 U.S.C. § 922(d)(4) (2006).

¹⁶² Zimring, *supra* note 9, at 149.

¹⁶³ *Id.* at 152.

¹⁶⁴ 18 U.S.C. § 922(g).

age, something most people have.¹⁶⁵ Also, felony convictions are recorded and tracked.¹⁶⁶ However, because of the difficulty in applying the disqualifying language, the Gun Control Act (and subsequent amendments) left a wide gap in the limitations intended to be imposed on those "adjudicated mental defective" and "committed to a mental institution." Those tasked with interpreting—and applying—the language have fared no better.

In discussing the prohibition that eventually resulted in the adopted language, "adjudicated as a mental defective or has been committed to any mental institution," senators most often used "mentally incompetent"¹⁶⁷ to describe such persons, intermittently using "psychotics,"¹⁶⁸ "psychopaths,"¹⁶⁹ "mentally deficient,"¹⁷⁰ "mentally or emotionally disturbed persons,"¹⁷¹ and "deranged persons."¹⁷² Only one reference among those addresses what would likely be understood to refer to

¹⁶⁵ However, as has been argued and seen in voter disenfranchisement situations, many citizens do not have government-issued identification. See Julien Kern, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marion County Election Board*, 42 LOY. L.A. L. REV. 629, 631–32 (2009) (describing the challenges that both certain minority groups and mainstream voters may encounter in trying to obtain state identification under laws such as Indiana's Voter ID Law). This calls into question issues of discrimination regarding the lawful purchase of firearms for persons, especially rural persons without proof of age.

¹⁶⁶ The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2006)) requires that background checks are conducted prior to sales by licensed firearms dealers. As a method to complete those checks, Congress required the FBI to implement the NICS, which tracks felony convictions, within five years of the passage of the Brady Bill. See Jacobs & Jones, *supra* note 121, at 393 (describing the establishment of the NICS and the databases which a prospective purchaser's background may be checked); see also *National Instant Criminal Background Check System*, FBI, <http://www.fbi.gov/about-us/cjis/nics> (last visited Sept. 15, 2011) (providing an overview of the NICS process). However, states did not necessarily submit the required data to the NICS, which led to the passage of the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180 § 2, 121 Stat. 2559 (2008).

¹⁶⁷ See Anthony P. Dunbar, *Torts—Liability of a Gun Dealer for Selling to a "Mental Incompetent"*, 58 TUL. L. REV. 1263, 1276 (1984) (citing congressional remarks in revealing the history of the Gun Control Act's adopted language including 114 CONG. REC. 26,718 (1968) (remarks of Sen. Dodd) (arguing that an overly expansive definition of "mental incompetent" will likely cause gun dealers to err on the side of caution and refuse to sell guns to both those with a legitimate mental illness and people who simply seem dishonest or odd); 114 CONG. REC. 26,718, 27,406 (1968) (letter submitted by Sen. Ervin); *id.* at 25,786 (statement submitted by Sen. Mansfield & Sen. Tydings); *id.* at 26,826, 27,409, 27,416 (remarks of Sen. Tydings); *id.* at 23,070 (remarks of Rep. Corman).

¹⁶⁸ 114 CONG. REC. 26,718, 23,070 (1968) (remarks of Rep. Anderson).

¹⁶⁹ *Id.* at 23,072 (remarks of Rep. Horton).

¹⁷⁰ *Id.* at 27,404 (remarks of Sen. Percy). The use of "mentally deficient" seems to indicate that persons with intellectual disabilities were intended to be covered by the language, at least by some members of Congress, but it is unclear if persons who have intellectual disabilities fall into the category of "adjudicated mentally defective." See McCreary, *supra* note 107, at 285–88 (addressing the history of the "mentally deficient" language, including congressional remarks and different courts' interpretations).

¹⁷¹ 114 CONG. REC. 27,420, 27,420 (1968) (remarks of Sen. Cannon).

¹⁷² *Id.* (remarks of Sen. Byrd).

intellectual disabilities (mentally deficient). And when asked, it seems that few people would question that dangerous persons with mental illness were intended to be singled out as a member of the special risk group who should not possess a firearm. But that understanding is both too broad and too narrow. And it is anything but simple.

The Supreme Court had the opportunity to comment on the language of the Gun Control Act in *Huddleston v. United States*.¹⁷³ In dicta, the Court considered the aims of the legislation prohibiting possession by specified groups. The goal involved keeping “these lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow.”¹⁷⁴ The Court noted that the goal was to keep firearms from persons where it would be “contrary to the public interest.”¹⁷⁵ The Court later noted that the Gun Control Act was intended, in addition to affect sales, to “keep firearms away from the persons Congress classified as potentially irresponsible and dangerous.”¹⁷⁶

Even with the Supreme Court’s review, nothing has been clarified. Most anyone understands that the law is intended to keep firearms away from people who are “irresponsible and dangerous,” but determining who is irresponsible and dangerous has been done, well, irresponsibly. And this has led to dangerous consequences.¹⁷⁷ The concern, of course, is that we not go too far. Just because a person has a diagnosed mental illness should not be reason enough for removing the person’s Second Amendment right of self-defense in his home.¹⁷⁸ But in trying to strike a balance of interests, the scale is tipped too far on the side of caution for the rights while leaving death on the other side.

¹⁷³ *Huddleston v. United States*, 415 U.S. 814, 825 (1974) (holding that the prohibition against making a false statement to a firearms dealer applies also to a transaction at a pawnshop).

¹⁷⁴ *Id.* (commenting about who Congress wanted to prevent from obtaining firearms) (quoting 114 CONG. REC. 13,219 (1968) (remarks of Sen. Tydings)).

¹⁷⁵ *Id.* at 824.

¹⁷⁶ *Barrett v. United States*, 423 U.S. 212, 213, 218 (1976) (addressing the conviction of a person who possessed a firearm in violation of the Gun Control Act due to his status as a convicted felon and concluding that the Gun Control Act applied to the behavior in question, the intrastate receipt of a firearm that had previously been transported in interstate commerce).

¹⁷⁷ *Supra* note 17 and Part II.A–B (detailing the psychological histories of the perpetrators of two of the most publicized gun-related crimes in recent history: the Virginia Tech campus shooting and the Tucson Arizona shooting of Representative Gabrielle Giffords and others).

¹⁷⁸ The relationship between mental illness and violence is complicated. *See, e.g.*, Price & Norris, *supra* note 99, at 123, 128 (suggesting that although there is an increased risk of violence displayed by the mentally ill, such risk may actually be smaller than commonly thought). The key focus on reform must be on the *dangerously* mentally ill—not just those who are adjudicated or even committed. *See supra* note 17 and accompanying text (providing facts about types of mental illnesses, the rate at which they affect American adults, and some available treatment methods).

1. *Adjudicated as a Mental Defective*

One of the mental health-related prohibitions against owning a firearm applies to those so adjudicated by a court as mental defectives and only when notice of the adjudication is provided to a national database.¹⁷⁹ What it means to be “adjudicated as a mental defective,” though, is not clear enough for consistent application.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) provides a definition of the language in the Code of Federal Regulation (C.F.R.):

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, 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.

(b) The term shall include—

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.¹⁸⁰

Although the C.F.R. definition provides a starting point for understanding how this Gun Control Act language will be interpreted, even that language is unclear. Even so, key areas do appear to emerge from this

¹⁷⁹ 18 U.S.C. § 922(d)(4) (2006).

¹⁸⁰ 27 C.F.R. § 478.11(a) (2010); *see also* Rostron, *Incrementalism*, *supra* note 108, at 551–52 (addressing the lack of notice of mental illness adjudication in Virginia which allowed Seung Hui Cho to purchase firearms in spite of a background check). In 2008, only four states regularly provided the information needed to keep the database current, and less than half of the states provided any information regarding mental health records. *Id.* at 552–53. Of particular concern, though, is what qualifies as a “court, board, commission, or other lawful authority” as an entity that could remove someone’s (now-understood) constitutional right. 27 C.F.R. § 478.11(a) (2010).

definition: adjudication, dangerousness, and mental capacity.¹⁸¹ At issue as related to mental illness are adjudications of dangerousness.¹⁸²

Shortly after the enactment of the Gun Control Act, and before the ATF had provided a definition,¹⁸³ the Eighth Circuit in *United States v. Hansel*¹⁸⁴ analyzed the “adjudicated as mental defective” language and concluded that it does not apply to persons with mental illness.¹⁸⁵ The Mental Health Board found that Hansel, the defendant, was mentally ill.¹⁸⁶ However, even if that could be considered “an adjudication,” the Eighth Circuit held, it was not the same as being adjudicated as mental defective.¹⁸⁷ The court referred to the testimony of the doctor from the case who said he understood “mental defective” to be “synonymous with mental retardation.”¹⁸⁸ Further, as the court noted, “In law, a distinction

¹⁸¹ A formal finding in a criminal trial process of insanity or a lack of competence to stand trial seems clear; still, such information would have to be communicated to any NICS system. Given that the records of felons seem to be better communicated, this creates less worry than the information as related to the other areas of the definition.

¹⁸² The identification of mental capacity should be understood to refer to intellectual disabilities. See McCreary, *supra* note 107, at 276–77, 280. What should not be confused, though, is the high burden of determining dangerousness regarding removing a person’s full liberty through a civil commitment. Indeed, expert testimony may be questionable at times and predicting one’s dangerousness propensities is challenging—not at all an exact science. See, e.g., Samantha Godwin, *Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. SOC. JUST. 647, 683 (2012) (stating that psychiatric explanations of mental illness are not based on reliable principles and methods, and that determinations of “dangerousness” among those with mental illness are usually not reliable). But we must view the restriction against firearm purchase and possession without as great a burden for civil commitment. Although the Supreme Court has identified this right as an individual right under the Constitution, see *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the right cannot outweigh the interest of the public in keeping those who are dangerous from purchasing or possessing a firearm—while being allowed, however, to live outside of civil commitment.

¹⁸³ It is plausible that the ATF’s definition which included *mental illness* as a contributor to mental defectiveness for purposes of the Gun Control Act was in response to this opinion.

¹⁸⁴ 474 F.2d 1120 (8th Cir. 1978).

¹⁸⁵ *Id.* at 1121, 1123. In *Hansel*, the defendant had been admitted to a hospital “for a brief period of observation.” *Id.* at 1122. Because this hospitalization was not in accord with civil commitment statutes in Nebraska, the State conceded that the defendant had not been “committed.” *Id.* Thus, the case turned on whether it could be held that the defendant had been “adjudicated” mentally defective. *Id.* at 1121.

¹⁸⁶ *Id.* at 1122.

¹⁸⁷ *Id.* at 1123.

¹⁸⁸ *Id.* For a person to receive a diagnosis of intellectual disability, there must be a “significant limitation” in intellectual functioning. *Definition of Intellectual Disability*, AAIDD, http://www.aaid.org/content_100.cfm (last visited Sept. 20, 2011) (“Intellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.”). Although not required, an IQ test may be used, and that score must typically measure below seventy—more than two standard deviations below the median—for such a diagnosis. See, e.g., *id.* (stating that a score must typically measure below seventy for such a diagnosis). This provides some sort of objective data regarding how far below normal qualifies as an intellectual disability and

has usually been made between those persons who are mentally defective or deficient on the one hand, and those who are mentally diseased or ill on the other."¹⁸⁹ The conclusion focused on subnormal intelligence as the target of legislation prohibiting those adjudicated as mentally defective from possessing firearms.¹⁹⁰ And although the court pointed to at least one other decision that interpreted "mental defective" differently, the court asserted it was giving the phrase its general meaning.¹⁹¹ Finally, the court distinguished a person with intellectual disabilities from a person with mental illness by stating, "A mental defective, therefore, as has often been said, is a person who has never possessed a normal degree of intellectual capacity, whereas in an insane person faculties which were originally normal have been impaired by mental disease."¹⁹²

The court concluded that Congress had not intended to prohibit possession from all persons who had any history of mental illness.¹⁹³ This is in stark contrast to what is often understood about the Gun Control Act.¹⁹⁴ The Eighth Circuit followed the Fifth Circuit and thus concluded that for a person with a mental illness to be prohibited from possessing a firearm that person must have been committed to a mental institution.¹⁹⁵

In *United States v. Vertz*,¹⁹⁶ a Michigan federal district court held that no adjudication of mental defectiveness had occurred in spite of court-ordered treatment and commitment.¹⁹⁷ In *Vertz*, the defendant had been treated for mental illness for twenty years, having been diagnosed with personality disorders and psychological problems.¹⁹⁸ Even though the defendant had been ordered by a judge to obtain treatment, because there was no finding that the defendant was a danger (or incapable of managing his affairs),¹⁹⁹ he did not meet the definition of having been adjudicated as a mental defective.²⁰⁰ Thus, in understanding *Vertz*, mental illness alone

means that only people who fall *statistically* and *significantly* below the "normal" scale, and not merely those with below average intelligence, are considered disabled.

¹⁸⁹ *Hansel*, 474 F.2d at 1124.

¹⁹⁰ *Id.* at 1124–25.

¹⁹¹ *Id.* at 1125.

¹⁹² *Id.* at 1124.

¹⁹³ *Id.* at 1125.

¹⁹⁴ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.").

¹⁹⁵ *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988) (citing *Hansel*, 474 F.2d at 1123). Again, the burden should be higher to commit a person due to dangerous mental illness than that required to prevent a person from purchasing or possessing a firearm. See *infra* note 235 (arguing that the burden on the government is higher for involuntary commitments).

¹⁹⁶ 102 F. Supp. 2d 787 (W.D. Mich. 2000).

¹⁹⁷ *Id.* at 788.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Vertz*, 102 F. Supp. 2d at 790–91.

will not disqualify a person from gun purchase or possession under the Gun Control Act—even mental illness that results in a court order to obtain treatment.²⁰¹ Instead, there must be an adjudication of dangerousness—or commitment.

On the other hand, the First Circuit has recently muddied the waters of interpreting the adjudicated leg of Section 922(g)(4). In *United States v. Rehlander*,²⁰² the court applied *District of Columbia v. Heller*²⁰³ as requiring due process before anyone could be denied Second Amendment rights.²⁰⁴ The First Circuit had previously affirmed a conviction for a party who had been held pursuant to a five-day emergency order.²⁰⁵ In holding the opposite in *Rehlander* when addressing a situation involving an “emergency procedure” hospitalization, the court concluded that because the procedure involved in the involuntary hospitalization did not include an adversary proceeding, then no due process occurred.²⁰⁶ The court concluded that this could not suffice for a commitment for the purposes of disqualifying a person from gun purchase or possession.²⁰⁷

Although the *Rehlander* court addressed a question of interpreting the commitment side of the Gun Control Act prohibitions,²⁰⁸ if the same logic is applied to the “adjudicated as a mental defective” language, difficulties could arise. For example, the definition includes a determination of dangerousness by “a court, board, commission, or other lawful authority.”²⁰⁹ Should that determination be made by a court, an adversarial proceeding seems likely, satisfying the concerns expressed in *Rehlander*. But if that determination is reached by a board, no such guarantee seems likely.

Additionally, this disqualifier requires an adjudication of dangerousness. The other, though, involves commitment.²¹⁰ In commitment issues, a person’s liberty is removed, and with that infringement on liberty, due process is guaranteed.²¹¹ But for a

²⁰¹ This should help alleviate the concerns that the prohibition is too inclusive. See, e.g., *supra* notes 17, 178 and accompanying text (mentioning that more than mere mental illness is required for disqualification).

²⁰² 666 F.3d 45 (1st Cir. 2012).

²⁰³ 554 U.S. 570 (2008).

²⁰⁴ *Rehlander*, 666 F.3d at 48.

²⁰⁵ See *United States v. Chamberlain*, 159 F.3d 656, 665 (1st Cir. 1998) (holding that an involuntary five-day commitment is statutorily sufficient), *overruled by* *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012).

²⁰⁶ *Rehlander*, 666 F.3d at 50–51.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 27 C.F.R. § 478.11(a) (2010).

²¹⁰ See *infra* Part IV (discussing this other disqualifier).

²¹¹ See, e.g., *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)).

determination of dangerousness, if the decision is not to commit, no such consideration of due process is likely.²¹²

Further, not all states have the same prohibition regarding “adjudicated as mental defective.” For example, in Virginia, the code prohibits those adjudicated incompetent from possession or purchasing firearms.²¹³ However, that section addresses incompetence in the same manner as the Gun Control Act does as related to those unable to contract or manage personal affairs. The Virginia section addressing mental illness issues does so only as related to commitment or orders for treatment with no prohibition for possession merely for a finding—even a formal, adversarial finding—of dangerousness.²¹⁴ Thus, the judge determining that Cho “present[ed] an imminent danger to himself as a result of mental illness” would not have disqualified Cho from purchasing a firearm under the current *Virginia* law.²¹⁵

Finally, and most importantly, we must consider what information is reported. After all, if those who are reporting the information do not interpret “adjudicated as a mental defect” in the manner that appears to be intended by the ATF, that information will never be conveyed. Consider, for example, the State of Texas’s *Frequently Asked Questions* as related to the NICS Act.²¹⁶ In addressing “Which type of cases should I report?” only the following are listed:

1. Commitments for temporary or extended inpatient mental health services;
2. Acquittals in criminal cases for reasons of insanity or lack of mental responsibility, whether or not the person was ordered to receive inpatient treatment or residential care under Chapter 46C, Code of Criminal Procedure;

²¹² This raises more issues regarding whether now there is a need for due process in removing Second Amendment rights—whether, in other words, *Rehlander* was decided correctly.

²¹³ VA. CODE ANN. § 18.2-308.1:2 (2012).

²¹⁴ VA. CODE ANN. § 18.2-308.1:3 provides:

It shall be unlawful for any person involuntarily admitted to a facility or ordered to mandatory outpatient treatment . . . involuntarily admitted to a facility or ordered to mandatory outpatient treatment as the result of a commitment hearing . . . or who was the subject of a temporary detention order . . . and subsequently agreed to voluntary admission . . . to purchase, possess or transport a firearm.

Id.

²¹⁵ REPORT, *supra* note 19, at 48. This is especially significant if an order for outpatient treatment would not be held sufficient to disqualify a person from firearm purchase or possession.

²¹⁶ *Frequently Asked Questions: Reporting Mental Health Cases Required by HB 3352*, available at <http://www.txcourts.gov/oca/pdf/faq.pdf> (last visited Oct. 4, 2012).

3. Commitments of a person determined to have mental retardation for long-term placement in a residential care facility under Chapter 593, Health and Safety Code;
4. Adult guardianships; and
5. Cases in which a person is found to be incompetent to stand trial under Chapter 46B, Code of Criminal Procedure.²¹⁷

Thus, Texas, like Virginia, does not seem to interpret “adjudicated as a mental defect” as anything related to dangerousness, in spite of the ATF language. But especially interesting is the rationale provided for the reporting of the records:

After the April 2007 shooting tragedy at Virginia Tech, it became apparent that very few mental health records had been made available to the FBI for background checks. The NICS Improvement Amendments Act of 2007 (NIAA) was passed to address the gap in information available to NICS about prohibiting mental health adjudications and commitments and other prohibiting factors. [In addition, it] required the automation of records to reduce delays for law-abiding gun purchasers.²¹⁸

Although the Virginia Tech shooting is used as a reason for the improved reporting,²¹⁹ none of what is required to be reported in Texas would have prevented Cho from buying a firearm.

If courts, states, administrative agencies, and the like cannot understand or agree on what is meant by “adjudicated as a mental defective,” it seems unlikely that individuals will know exactly when they have fallen under that umbrella.²²⁰

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See, e.g.*, U.S. DEP’T OF JUSTICE, FIREARMS TRANSACTION RECORD PART I—OVER-THE-COUNTER 1, available at <http://www.atf.gov/forms/download/atf-f-4473-1.pdf> (last revised Apr. 2012) (“Have you ever been adjudicated mentally defective (*which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs*) OR have you ever been committed to a mental institution?” (emphasis omitted)). The form provides further information in the instructions:

Committed to a Mental Institution:

A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in mental institution for observation or a voluntary admission to a mental institution.

2. *Committed to a Mental Institution*

Adding to the lack-of-clarity problem are different interpretations and applications of the language "committed to a mental institution."²²¹ This is the portion of the Gun Control Act language that the Virginia Tech Review Panel took note of.²²² And this is an especially problematic area in which states differ.

The ATF provides that "commitment to a mental institution" means:

A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.²²³

But like *adjudicated as a mental defective*,²²⁴ the language has not been consistently interpreted or applied.

Shortly after the Gun Control Act's enactment (and again, before the ATF provided a definition), the Eighth Circuit faced a case in which it had to decide if the defendant, convicted of violating the Gun Control Act, had indeed been prohibited from firearms possession.²²⁵ The Board of Mental Health had found the defendant to be mentally ill and in need of commitment.²²⁶ However, once admitted, the doctor on staff determined that the defendant did not have a serious mental disorder and was not in

Id. at 4. Special provisions are included for members of the military who were adjudicated by the Department of Veterans' Affairs. *Id.*

²²¹ See, e.g., REPORT, *supra* note 19, at 71–73 (comparing federal law, where both inpatient and outpatient treatment were considered "committed to a mental institution," to Virginia law, where the status of outpatient treatment was unclear).

²²² See *id.* (discussing the uncertainty of Cho's right to purchase firearms under Virginia law given the uncertainty of the language).

²²³ 27 C.F.R. § 478.11 (2010).

²²⁴ Interestingly, the ATF itself here distinguishes between mental defectiveness and mental illness, but in its own definition for *adjudicated as a mental defective*, it refers to mental illness. *Id.*; see *supra* notes 220–22 and accompanying text (discussing the difference in interpretation of mental defectiveness under state and federal law). It is this sort of circular, overlapping language that causes problems in application.

²²⁵ *United States v. Hansel*, 474 F.2d 1120, 1121 (8th Cir. 1973).

²²⁶ *Id.* at 1122. In *Hansel*, it appears that the Mental Health Board alone made the decision regarding Hansel's commitment. *Id.* at 1123. Thus, the likelihood that sufficient due process occurred is low, contradicting the issues raised in *Rehlander*. See *United States v. Rehlander*, 666 F.3d 45, 48–50 (1st Cir. 2012) (discussing the need for due process in suspending Second Amendment rights following an involuntary hospitalization for mental health).

need of hospitalization.²²⁷ Two weeks later, the defendant was released and then formally discharged.²²⁸

The Eighth Circuit determined that because the statutory procedures for civil commitment had not been followed, the defendant had not been “committed” to a mental institution for purposes of the Gun Control Act.²²⁹ Instead, the defendant had been held at the hospital only for observations.²³⁰ And the court stated that the Gun Control Act makes clear that a *commitment* is required.²³¹

Returning to *Vertz*, and addressing the other possible reason for prohibition from gun ownership, the District Court for the Western District of Michigan also addressed the issue of commitment by analyzing two time periods when the defendant faced hospitalization.²³² In September 1988, a probate court determined that the defendant was mentally ill and needed treatment after he was admitted for involuntary treatment based in part on a physician’s certificate, signed after the defendant had been threatening suicide.²³³ A second physician concurred a few days later.²³⁴ However, the probate court order did not result in hospitalization because an alternative treatment program to meet the defendant’s needs was available.²³⁵

In June 1993, the defendant was involuntarily admitted to a medical center after a physician signed a certificate noting that the defendant posed

²²⁷ *Hansel*, 474 F.2d at 1122.

²²⁸ *Id.*

²²⁹ *Id.* at 1123. *Cf.* United States v. *Vertz*, 40 F. App’x 69, 73–74 (6th Cir. 2002) (refusing to rely on Michigan commitment requirements in determining whether the defendant had been “committed” such as would preclude legal firearm possession: “[t]o give preclusive effect to each state’s individual definition of terms in the firearms statute would be to frustrate one of the main purposes of the law, which is to provide for national uniformity in the application of firearms restrictions”).

²³⁰ *Hansel*, 474 F.2d at 1123.

²³¹ *Id.*; *see also* 27 C.F.R. § 478.11 (2010) (“The term [committed to a mental institution] does not include a person in a mental institution for observation . . .”).

²³² *Vertz*, 102 F. Supp. 2d at 789.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* Advocates for the rights of those with mental illness encourage using the least restrictive alternative when considering treatment options for persons. *See Position Statement 22: Involuntary Mental Health Treatment*, MENTAL HEALTH AM., <http://www.nmha.org/go/position-statements/p-36> (last visited Sept. 30, 2012) (“[I]nvoluntary treatment in an in-patient setting should only occur as a last resort and should be limited to instances . . . when no less restrictive alternative will respond adequately to the risk.”). The Mental Health America is formerly known as the National Mental Health Association. *Our History by Decade*, MENTALHEALTHAMERICA, <http://www.mentalhealthamerica.net/centennial/history.html> (last visited Oct. 30, 2012); *see also* Ken Kress, *An Argument for Assisted Outpatient Treatment for Persons with Serious Mental Illness Illustrated with Reference to a Proposed Statute for Iowa*, 85 IOWA L. REV. 1269, 1302–06 (2000) (discussing the potential benefits of utilizing outpatient treatment before involuntary hospitalization is required).

the likelihood of injury to others.²³⁶ (He had been threatening to kill the president.²³⁷) The defendant was discharged three days later.²³⁸

The court held that the 1988 hospitalization qualified for "commitment" for purposes of prohibiting firearms possession under the Gun Control Act.²³⁹ The court noted the recent trend among other circuits to separate the question of adjudication from the question of commitment.²⁴⁰ The court cited other cases finding that commitment to restore competency to stand trial had qualified as commitment²⁴¹ as had emergency commitment lasting only five days and followed by voluntary admission.²⁴² And a commitment based on two physicians' recommendations, but without a formal judicial process, also had qualified as commitment for purposes of the Gun Control Act.²⁴³ Because the *Vertz* defendant's 1988 stay at a hospital had been based on two physicians' certificates, even though the court order itself did not result in inpatient involuntary hospitalization, the court held that *Vertz's* situation qualified him as a person who had been "committed to a mental institution."²⁴⁴

In reaching its decision, the court appeared to give special credence to the First Circuit's acknowledgement that the benefit of including more people in the prohibition against gun possession—without a full judicial determination—was great and presented a stronger government interest:

To require a full-scale adversary proceeding and a finding, by clear and convincing evidence, that a person is mentally ill and poses a likelihood of harm to himself or others before giving effect to the firearms ban would undermine Congress's judgment that risk or potential, not likelihood, probability, or certainty, of violence is all that is required.

Nor does it appear that Congress intended that only persons conclusively found to be suffering from mental illnesses or difficulties after having been afforded the fullest possible panoply of due process rights be deemed to have been "committed to a mental institution" for purposes of the

²³⁶ *Vertz*, 102 F. Supp. 2d at 789.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 791.

²⁴⁰ *Id.* at 790.

²⁴¹ *Id.* (citing *United States v. Midgett*, 198 F.3d 143, 146 (4th Cir. 1999)).

²⁴² *Id.* (citing *United States v. Chamberlain*, 159 F.3d 656, 664 (1st Cir. 1998), *overruled by* *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012)).

²⁴³ *Id.* (citing *United States v. Waters*, 23 F.3d 29, 31–36 (2d Cir. 1994)). Whether this could stand under the First Circuit's new requirement for due process remains unclear. See *Rehlander*, 666 F.3d at 48–50 (holding that a permanent suspension of Second Amendment rights following an involuntary hospitalization requires formal adjudication).

²⁴⁴ *Vertz*, 102 F. Supp. 2d at 791.

firearms ban. That level of formality is not required for most of the categories Congress identified as within the firearms ban, including those who have merely been indicted for a crime. When Congress has intended that a particular status triggering the firearms ban be conditioned upon notice and the opportunity to be heard, along with other procedural rights, it has stated so explicitly.²⁴⁵

The ATF's definition has not been controlling. The Fourth Circuit held that commitment to restore competency was a disqualifying event even though that is not a category under the definition.²⁴⁶ On the other hand, the First Circuit has appeared to reverse its determination that an emergency detention serves as a disqualifying event, but the court did not do so by referencing the ATF definition; it did so based on *Heller*.²⁴⁷ The Second Circuit's decision, then, that a person had been committed in a manner to serve as a disqualifying event based only on the certification of two physicians and not due to a formal adversarial process appears to be at risk for reversal if the Second Circuit falls in line with the First.²⁴⁸

The only consistency in the above is the confusion created in trying to apply the Gun Control Act's language.

IV. TOWARD SAFETY: IDEAS FOR NEW STANDARDS FOR FIREARM PURCHASE AND POSSESSION BY THE (DANGEROUSLY) MENTALLY ILL

The State of Virginia launched an extensive investigation into trying to understand how the tragedy occurred there—the tragedy that ended the lives of thirty-two people. The Review Panel made recommendations, and agencies reacted. But like a lot of reactionary legislation, its effect may be limited. Those who proposed or voted for change might feel better—or be able to use such in a campaign speech—but little change actually takes place. Under the Gun Control Act, after all, neither Jared Lee Loughner nor James E. Holmes was prohibited from purchasing his deadly weapons.

Granted, legislation exists that attempts to address this. The Gun Control Act itself appears to directly limit possession of a firearm by persons belonging to named groups: minors and felons and persons with mental illness or who have been adjudicated mentally defective.²⁴⁹ The language, although barely fifty-years old, is so engrained in society's thoughts regarding who can possess a firearm that Justice Scalia, writing

²⁴⁵ *Id.* at 790–91 (quoting *Chamberlain*, 159 F.3d at 664) (citation omitted). *But see Rehlander*, 666 F.3d at 50–51 (holding that due process is required to remove one's Second Amendment rights); *supra* notes 202–09 and accompanying text (discussing *Rehlander*).

²⁴⁶ *United States v. Midgett*, 198 F.3d 143, 146 (4th Cir. 1999).

²⁴⁷ *Rehlander*, 666 F.3d at 50.

²⁴⁸ *United States v. Waters*, 23 F.3d 29, 31–36 (2d Cir. 1994).

²⁴⁹ 18 U.S.C. §§ 922 (b), (d) (2006).

for the majority in *Heller*, seemed to assert that these prohibitions are almost presumed to be constitutional:

Like most rights, the right secured by the Second Amendment is not unlimited. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.²⁵⁰

Thus, although the Court recognized the Second Amendment as an individual right providing for the possession of a handgun in one's home for self-defense purposes, limiting whom this right applies to regarding persons with mental illness appears to be acceptable.²⁵¹ Justice Scalia's conclusion that the limitation is acceptable is not explained by him, but its legality is presumed.²⁵²

Adding to the trouble in this area is the debate between several groups. On the one hand, advocates for the rights of the mentally ill typically assert that constitutional rights should not be infringed upon merely because of a mental illness.²⁵³ Additionally, proponents of broad gun rights tend to object to any legislation that might limit the free possession of weapons among citizens.²⁵⁴ These two groups, however, appear to hold too staunchly to their positions without being willing to truly investigate the deeper, underlying issues that call for attempts at reducing improper and ill-advised gun possession.²⁵⁵

²⁵⁰ District of Columbia v. *Heller*, 554 U.S. 570, 626–27 (2008).

²⁵¹ *Id.*

²⁵² See *id.* at 627 n.26. (describing a prohibition on the possession of firearms by the mentally ill as a "presumptively lawful regulatory measure[.]"); see also Rostron, *Protecting*, *supra* note 133, at 387 ("The majority then offers a list of other 'presumptively lawful regulatory measures,' but without even trying to explain how it has arrived at the conclusion that these particular sorts of gun control laws are constitutional." (quoting *Heller*, 554 U.S. at 627 n.26)).

²⁵³ See, e.g., *Position Statement 22: Involuntary Mental Health Treatment*, *supra* note 235; Michael Perlin, "A Change Is Gonna Come": *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U.L. REV. 483, 483 n.1 (2009) (listing cases addressing areas of constitutional rights affecting those with mental disabilities). These issues are likely to be at the forefront of challenges and debates regarding a recent law enacted in New York requiring mental health professionals to report patients who exhibit behavior that might be indicative of a risk of dangerousness. See David Ariosto, *N.Y. Governor Signs Nation's First Gun-Control Bill Since Newtown*, CNN (Jan. 16, 2013), <http://www.cnn.com/2013/01/15/us/new-york-gun-bill/index.html>.

²⁵⁴ See generally SPITZER, *supra* note 109, at 14–15 (discussing objections to gun control legislation among gun rights advocates).

²⁵⁵ E.g., *id.* at 174–76.

The Virginia Tech Review Panel suggests federal incentives be put in place to ensure information is reported, noting that “[i]n a society divided on many gun control issues, laws that specify who is prohibited from owning a firearm stand as examples of broad agreement and should be enforced.”²⁵⁶

But that is not enough. The Gun Control Act language is not enough. Instead, actual reform needs to occur to prevent the dangerously mentally ill, even if not committed to a mental institution, from purchasing and possessing firearms. In that reform, Congress should consider shifting the burden of reporting to the purchaser, perhaps in the form of obtaining a permit, broadening the definition of commitment to prevent the Virginia Tech gap, and correcting the definition of *mentally defective*.

A. *Shifting the Burden to the Purchaser*

The NICS Improvement Act has not been effective across all states.²⁵⁷ In spite of the attention paid to the NICS when the date under the Improvement Act arrived and records were to be current, the chatter over the inadequacies of reporting has died down.

Further, privacy issues as related to reporting mental health records continue to worry health professionals.²⁵⁸ Schools have misunderstood which privacy regulations apply as related to students in mental health treatment.²⁵⁹ Mental health professionals and those who advocate for persons with mental illness fiercely want to protect the records of those with mental illness.²⁶⁰ However, much of this problem involves a limited understanding of how the NICS system works. A person’s medical history is not necessarily revealed to the FFL conducting a background check if state law prohibits such disclosure; instead, a state may share only that a person should be included in the denied persons list without revealing specific information as related to mental illness.²⁶¹ Instead, if a person does not qualify, only that information is made available to the seller.²⁶²

²⁵⁶ REPORT, *supra* note 19, at 76.

²⁵⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 158, at 19.

²⁵⁸ See REPORT, *supra* note 19, at 65 (discussing how federal and state laws both state that health information is private and can only be disclosed if requested by the person who is the subject of the records, if disclosure is necessary in order to make medical treatment effective, or in situations where privacy is outweighed by other interests); *Frequently Asked Questions: Reporting Mental Health Cases Required by HB 3352*, *supra* note 216 (highlighting privacy concerns); see also *supra* note 253.

²⁵⁹ REPORT, *supra* note 19, at 75.

²⁶⁰ Price & Norris, *supra* note 99, at 124–25.

²⁶¹ Press Release, *supra* note 129.

²⁶² Dep’t of Justice Info. Sys., *The National Instant Criminal Background Check System: Correction of Erroneous System Information*, Part 25, § 25.10 (Oct. 30. 1998), available at <http://www.fbi.gov/about-us/cjis/nics/federal-register-october-30-1998-on-nics>.

The person attempting to make the purchase is provided, upon request, contact information to personally—and privately—follow up.²⁶³

Considering these and other issues, rather than relying on outside agencies to provide and gather information from every state agency and hospital in order to determine who might not qualify for gun possession based on a mental illness issue, we should approach this issue from the reverse angle: insist that the person who wants to purchase a gun be required to prove her fitness to do so. This can be done in the form of a medical certificate or, preferably, in the form of a permit.

Under the idea of either a medical certificate or a permit, persons would not be discouraged from seeking treatment or even, when warranted, hospitalization.²⁶⁴ If hospitalization, whether voluntary or involuntary, were not accompanied by an automatic removal of one's Second Amendment rights, then persons seeking treatment would have one less excuse not to get the full help that might be medically warranted. Additionally, this could encourage a continuing development of a relationship with a physician who could monitor a patient's progress and work *with* the patient on this issue. When the person with a diagnosed mental illness approaches her physician to discuss the need for a mental health certificate to purchase a firearm, the physician is on notice of the person's proclivity toward firearm use and the possibility that there are new issues of paranoia (wanting the firearm for protection) or dangerousness (wanting the firearm to use against someone).²⁶⁵ This provides an excellent therapeutic opportunity for the physician to engage in a conversation with the person.²⁶⁶ More importantly, this would be an issue *only* for persons who wish to purchase or acquire a firearm; no one else's mental health records would be exposed.

Expanding the medical certificate to a requirement for a permit would address not only the issues raised in this Article, but would also provide solutions for problems stemming from, for example, the gun-show

²⁶³ *See id.*

²⁶⁴ *Supra* Part IV.B.

²⁶⁵ Such a system would likewise require the assurance that physicians who provide this certification are immune from tort liability should a party cause harm with a firearm, either through negligent handling or through intentional use. A determination that a clearly identifiable threat existed, however, would preempt immunity in states that follow the *Tarasoff* line of reasoning which holds professionals liable for failure to warn.

²⁶⁶ Consider also a recent bill introduced in Florida that proposed that doctors not be allowed to ask parents about gun possession in a home. This was met with great outrage by physicians; as they argued, physicians have an interest in the safety of their patients. *See Wollschlaeger v. Farmer*, No. 11-22026-Civ., 2012 WL 3064336, at *1-3 (S.D. Fla. June 29, 2012) (describing the Florida law that protected patients' privacy rights regarding firearm ownership and the opposition that it met from physicians who claimed that information about firearm possession is relevant to a patient's care).

loophole.²⁶⁷ Requirements for a permit could include a mental health certification, as well as a background check for criminal records using an NICS database. This permit could then be used for *any* gun transaction, including that with an FFL, at a gun show, between private citizens, etc. Under a system requiring a permit, only persons who are attempting to obtain a firearm would need to have their mental health records considered. As long as the person reviewing the permit had no reason to believe the permit was invalid, the person could transfer, sell, or give the firearm to the authorized recipient.²⁶⁸ For private transactions, a permit issued within the past two years should be sufficient. For retail or gun-show transactions, however, the permit plus an on-the-spot NICS check could be used to further prevent those who fall through the cracks of gun control legislation from purchasing firearms illegally.

Requiring a permit merely to purchase a firearm might also lessen a push towards the federal government implementing a registration of all firearms, a registration some fear could lead to a firearms list kept and tracked by the federal government.²⁶⁹ Distinguished from a registration, the issues raised here are not about what firearms are owned²⁷⁰ or how

²⁶⁷ See Andrew Goddard, *A View Through the Gun Show Loophole*, 12 RICH. J.L. & PUB. INT. 357, 357–58 (2009) (discussing the ability for people to make occasional sales of firearms from a personal collection at a gun show without the need to obtain a federal license to sell firearms).

²⁶⁸ Perhaps by instituting some sort of tort—or even criminal—liability on anyone who sold a firearm to another person when the seller was reckless regarding the validity of the license or the mental state of the purchaser, we would be closer to closing this loophole.

²⁶⁹ See, e.g., Lindsey Boerma, *NRA President: Door-to-Door Gun Confiscation a “Legitimate Fear,”* CBS NEWS (Jan. 16, 2013), http://www.cbsnews.com/8301-34222_162-57564389-10391739/nra-president-door-to-door-gun-confiscation-a-legitimate-fear/.

One of his fears: that a universal background check for anyone purchasing a firearm—the first of Mr. Obama’s suggestions today—would lead to a national tracking registry of gun owners. That, in turn, Keene said, could give way to “forced buybacks,” or, door-to-door confiscation of specific weapons by the government.

In other words, “I have a record that you have a shotgun, and you’re going to sell it to the government, or else,” Keene said. “That’s the equivalent of confiscation.”

Id. However, the comments by Mr. Keene, NRA President, are illogical. A background check merely indicates who has applied to purchase a firearm; it does not, in any manner, provide a list of what firearms are actually owned by someone. Similarly, applying for a concealed weapons permit merely allows a person to carry a concealed weapon; it does not necessarily notify any government agency of what firearms are owned or carried by the permit holder.

²⁷⁰ Since the shooting at the elementary school in Newtown Connecticut, many have argued for reinstating the ban on assault-style weapons. See, e.g., Gary Langer, *After Newtown Shootings, Most Back Some Gun Controls, Poll Shows*, ABC NEWS (Jan. 14, 2013), <http://abcnews.go.com/blogs/politics/2013/01/on-eve-of-newtown-recommendations-most-back-new-gun-control-measures/>. Reinstating the ban was also part of President Obama’s proposals as shared immediately before this Article went to print. See President Barack Obama, *Speech on Gun Control Measures*, Jan. 16, 2013 (transcript available at http://www.washingtonpost.com/politics/president-obamas-remarks-on-new-gun-control-proposals-jan-16-2013-transcript/2013/01/16/528e7758-5ffc-11e2-b05a-605528f6b712_story.html).

many are owned, gathered, or collected. The issue is *who* seeks to purchase or possess firearms when persons with dangerous mental illness are so easily able to acquire firearms. Thus, a permit to acquire is preferred over a registration of firearms, perhaps calming some fears of those who oppose gun control legislation.

One problem with this idea is that it creates a disparate impact on the poor. If we require a medical certification or a permit based on a physician's approval, such physician visits and permits could present a cost to the would-be gun possessor. Thus, for this idea to be implemented, we must also allow Medicaid to pay for this examination; the permit, much like registering to vote, should come without a cost to the citizen. Otherwise, it will be unjustly burdensome for the poor to obtain the necessary mental health certificate or permit.

The proposal here is that we proactively seek to determine if there is that risk or potential of violence rather than reactively, perhaps after Jared Loughner or James Holmes acts, determining in hindsight and when faced with widespread fatalities that, indeed, violence was a near-certainty.

Additionally, implementing the requirement for a permit does not necessarily raise due process concerns.²⁷¹ Along with a permit requirement, there must be procedural protections in place to allow any person denied a permit the opportunity to appeal the denial in an adversarial proceeding. For if courts are comfortable with a finding that one doctor's recommendation that a person receive treatment is sufficient to remove a person's right to liberty,²⁷² then it follows that the court should be equally as comfortable to require proving one's fitness to possess firearms based on a doctor's recommendation.

To prevent "gaming" the system, once a physician is approached by a patient requesting the required certificate whom the physician deems unfit, this determination would need to be provided to the NICS database. Again, the patient could appeal such a determination, but the system could not allow for the patient to "doctor shop" until she found a physician willing to grant approval. Thus, patients who merely wish to seek mental health counseling, even if they need to discuss ideations of dangerousness

²⁷¹ See *supra* notes 202–09 and accompanying text.

²⁷² Determinations for civil commitment may be made on very little evidence of mental illness and dangerousness—often requiring the testimony of only one licensed physician. See, e.g., S.C. CODE ANN. § 44-17-530. Although clear and convincing evidence is the standard, scholars conclude that psychiatrists are more likely to testify leaning in favor of commitment rather than in favor of out-patient treatment. See, e.g., William M. Brooks, *The Tail Still Wags the Dog: The Pervasive and Inappropriate Influence by the Psychiatric Profession on the Civil Commitment Process*, 86 N.D. L. REV. 259, 263 (2010); Grant H. Morris, *Defining Dangerousness: Risking a Dangerous Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 66 (1999).

or suicide, will not have their information shared *unless* they also express a desire to acquire a firearm.²⁷³

States allow for civil commitment to a mental institution even when no dangerousness is present, allowing involuntary commitment if one is not able to care for herself,²⁷⁴ and regarding those committed due to dangerousness, states use different definitions for understanding who might be “dangerous.”²⁷⁵ With different definitions, persons committed in one state may not be committed in another state, depending on how the term dangerous is defined for the deciding body. A federal law requiring a proactive approach by the purchaser to prove fitness to purchase and possess a firearm would be more consistent and fairer across jurisdictions.²⁷⁶

This issue is, of course, broad: the Second Amendment is a right that is freely established and automatic.²⁷⁷ But so too is the right to free assembly.²⁷⁸ And rules exist regulating that right such that those requiring a party wishing to assemble to obtain a permit before doing so.²⁷⁹ The balance of interests in requiring such a permit shows that the government’s legitimate interest outweighs the minor inconvenience for a party to obtain a permit. Similarly, the government’s great interest in assuring the dangerously mentally ill do not possess firearms greatly outweighs any minor inconvenience in obtaining a certificate of approval for gun possession.

²⁷³ See Ariosto, *supra* note 253.

²⁷⁴ See, e.g., OR. REV. STAT. § 426.130 (allowing commitment of a person determined to be mentally ill (as defined in Section 426.005, allowing a person to be found mentally ill if she is “[u]nable to provide for basic personal needs and is not receiving such care as is necessary for health or safety”)); S.C. CODE ANN. § 44-17-580 (allowing commitment if one “lacks sufficient insight or capacity to make responsible decisions with respect to his treatment”). *But see* Brooks, *supra* note 272, at 263 (noting that numerous jurisdictions removed a *parens patriae* type of justification for involuntary civil commitment).

²⁷⁵ Cf. Jana R. McCreary, *Not Guilty . . . Until Recommitment: The Misuses of Evidence of the Underlying Crime in NGRI Recommitment Hearings*, 2009 UTAH L. REV. 1253, 1267 (2009) (identifying different problems with two states’ definitions—or lack thereof—of “dangerous” as used for recommitment of persons found not guilty by reason of insanity, statutes with language directly from or the same as those for involuntary civil commitment); *see also* Brooks, *supra* note 272, at 265 (explaining the difficulties of defining dangerousness).

²⁷⁶ The United States District Court in Montana recently held that the Gun Control Act was a valid exercise of Congress’s Commerce Clause power. *Mont. Shooting Sports Ass’n v. Holder*, No. CV-09-147-DWM-JCL, 2010 WL 3926029, at *22 (D. Mont. Aug. 31, 2010).

²⁷⁷ See U.S. CONST. amend. II (“[T]he right of the people to keep and bear arms[] shall not be infringed.”).

²⁷⁸ See U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .”).

²⁷⁹ See, e.g., *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (explaining that regulations that ensure the safety and convenience of the public by requiring a party to obtain a permit to use public land are not inconsistent with civil liberties).

Most people I have discussed this idea with respond by saying "That will never happen" or "There is no way Congress would do that." Until December 2012, I believed they were correct. But after the Newtown, Connecticut shooting on December 14, 2012,²⁸⁰ public opinion may be shifting.²⁸¹ However, even though it seems that public opinion favors more gun control, the strength of those who advocate for gun rights will almost certainly outweigh any move toward a national requirement for registration of all firearms.²⁸² But we also must not go too far, as New York appears to be skating towards by infringing on the confidentiality of all patients who seek mental health treatment and who may have ideations of dangerousness about themselves or others.²⁸³ Regarding firearms, then, a proactive approach to prove one's fitness and background is the better approach. Instead of relying on states to report vague information,²⁸⁴ we should place the burden on the person who wants to acquire a firearm. One cannot help but wonder what one is hiding if she does not want to have her background checked, or if she is reluctant to seek a physician's determination that she does not present a danger to society in owning a firearm.

Even with this information, though, other approaches could work to ensure safety and to close the gaps of defective language.

B. *Broadening the Definition of Commitment*

The ATF provided a definition of *committed to a mental institution* that included involuntary commitment to an institution and explicitly excluded voluntary admission.²⁸⁵ Further, excluded from the ATF's definition is admission for observation—seemingly, those emergency admissions used to determine if a formal commitment is warranted.²⁸⁶

²⁸⁰ See El-Ghobashy & Barrett, *supra* note 106.

²⁸¹ See Langer, *supra* note 270; Alan Greenblatt, *What Are The Odds of Gun Control Changes?*, NPR.ORG (Dec. 19, 2012), <http://www.npr.org/2012/12/19/167640400/what-are-the-odds-of-gun-control-changes>.

²⁸² See, e.g., Alan Greenblatt, *What Gun Control Could Look Like*, NPR (Dec. 17, 2012), <http://www.npr.org/2012/12/17/167463334/what-gun-control-could-look-like>.

²⁸³ Thomas Kaplan & Danny Hakim, *New York Has Gun Deal, with Focus on Mental Ills*, N.Y. TIMES (Jan. 14, 2013), http://www.nytimes.com/2013/01/15/nyregion/new-york-legislators-hope-for-speedy-vote-on-gun-laws.html?_r=0. "[S]uch a requirement 'represents a major change in the presumption of confidentiality that has been inherent in mental health treatment. . . . The prospect of being reported to the local authorities, even if they do not have weapons, may be enough to discourage patients with suicidal or homicidal thoughts from seeking treatment or from being honest about their impulses.'" *Id.* (quoting Dr. Paul S. Appelbaum, Director of the Division of Law, Ethics, and Psychiatry at the Columbia University College of Physicians and Surgeons).

²⁸⁴ See, e.g., *id.* ("Calling on states to do a better job of uploading their mental health records into national databases would address this issue without in any way impinging on gun rights, says Wilson, the Roanoke College public affairs professor.")

²⁸⁵ 27 C.F.R. § 478.11 (2010).

²⁸⁶ *Id.*

Nothing, though, is said about commitment to outpatient treatment. All of these issues need clarification and consistent treatment, and all of them should be considered relevant in serving as disqualifiers. The other important consideration is that the disqualifiers include a concern with dangerousness, not simply commitment.

1. *Voluntary Admission*

Included in a disqualifying commitment to a mental institution should be voluntary admission. The only seemingly logical argument against this is that the person who is able to make the rational decision to seek treatment and help is rational enough to purchase a firearm. This does not hold up to a deeper examination.

First, when someone has an active, involved family, often the family members are able to talk the person into voluntary admission.²⁸⁷ This is therapeutic in the sense that the family is not seen in an adversarial manner and can assist in the course of treatment.²⁸⁸ But should this happen, the person who willingly admits herself to a hospital when needed to obtain treatment will never be “committed” under any of the Gun Control Act or ATF language, nor will that person likely face “adjudication.”²⁸⁹ Thus, a plethora of persons who are dangerously mentally ill will never be reported in any NICS database—because they have active, involved families.

Additionally, having a patient who has been held for temporary observation and who then voluntarily admits himself is also therapeutic in that the patient may feel a sense of control over the course of his treatment. This, of course, is more easily achieved after that initial observation period, especially if medication has assisted in stabilizing the person.²⁹⁰

Finally, we must consider the issue of medication. In that initial emergency observation hospitalization, medication may be used involuntarily if there is a sense of danger to self or other.²⁹¹ No hearing is held; this can be accomplished based on a determination of treating physicians. Its use, after all, is temporary. But within forty-eight or seventy-two hours of the start of that observation period, a person may then be asked to admit himself to hospitalization.²⁹² It is possible that,

²⁸⁷ See NAT'L ALLIANCE ON MENTAL ILLNESS MINN., UNDERSTANDING THE MINNESOTA CIVIL COMMITMENT PROCESS 3 (2006), <http://www.namihelps.org/assets/PDFs/civilcommitmentSinglePg102108.pdf> (describing how a mental health emergency often triggers the concern of family members who may consider Civil Commitment for the person).

²⁸⁸ Jacobs & Jones, *supra* note 121, at 394 n.41 and accompanying text.

²⁸⁹ 27 C.F.R. § 478.11 (2010).

²⁹⁰ Cf. *Study Presented to JCHC Finds Longer Periods of Temporary Detention Lead to Reduction in Civil Commitments*, 31 DEV. MENTAL HEALTH L. 12 (July 2012).

²⁹¹ See, e.g., *Hightower by Dahler v. Olmstead*, 959 F. Supp. 1549, 1566 (N.D. Ga. 1996) (authorizing forced medication of a patient in psychiatric care).

²⁹² Cf. *Study Presented to JCHC Finds Longer Periods of Temporary Detention Lead to Reduction in Civil Commitments*, 31 DEV. MENTAL HEALTH L. 12 (July 2012).

under the influence of sedating medications, the person would be more willing to do so than otherwise. Thus, a question lingers as to whether a voluntary admission really is actually voluntary. But no question exists as to the dangerousness of the behavior that led to that initial observation period. This is why the most crucial change would be to include an emergency observation period as qualifying as one having been *committed to a mental institution*.

2. *Temporary Observation*

Courts have concluded that a temporary observation hospitalization should not serve as a disqualifying event under the Gun Control Act.²⁹³ But it must.

When one is held for the short period to determine whether full civil commitment procedures need to be engaged in, that is because an emergency situation exists. The person has been submitted to the custody of the state because of reports of dangerousness to self or others.²⁹⁴ Someone has observed the person's behavior and determined that cause exists sufficient to warrant removing that person from society. These same issues should warrant anyone of reasonable caution to agree that such person should neither purchase nor possess a firearm.

Consider too that the disqualification need not be permanent. Anyone may petition for removal from the list of those ineligible to purchase a firearm. Thus, the right may be restored.

And as explained above, the temporary observation may be necessary only until the person is stabilized—such as with an adjustment to a medication dosage. Should the person, after the stabilization occurs, not need inpatient treatment and subsequently agree to pursue outpatient treatment, this person will not be ineligible to purchase or possess a firearm. But even if the behavior and risk is not sufficient to remove someone's liberty with a civil commitment due to the security of the stabilization, it would seem that on the sliding scale of interests involved,

²⁹³ *United States v. Hansel*, 474 F. 2d 1120, 1123 (8th Cir. 1973) (explaining that nothing in the Gun Control Act indicates that a person who has been hospitalized for observation is prohibited from the possession of firearms); *United States v. Rehlander*, 666 F.3d 45, 47 (1st Cir. 2012) (holding that a person who has been temporarily in a mental institution was not prohibited from owning a gun under the Gun Control Act). *But see* *United States v. Waters*, 23 F.3d 29, 31–36 (2d Cir. 1994) (allowing a temporary involuntary confinement that was later changed to a voluntary admission to be considered a "commitment" for purposes of applying the prohibition against possession of firearms).

²⁹⁴ Removing all guns for persons with mental illness, without any showing of dangerousness, is as absurd as removing the same right of all convicted felons. White-collar crime should not raise the same issues as a murder conviction. Not all white-collar crimes lead to firearms prohibitions. *See* 18 U.S.C. § 921 (a)(20)(A) (2006) ("The term 'crime punishable by imprisonment for a term exceeding one year' does not include—any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . .").

restricting that right to a firearm would be reasonable under the circumstances until one might be assured that the stabilized state would continue.

3. *Court-Ordered Outpatient Treatment*

As related to the above, states also vary regarding whether court-ordered outpatient treatment serves as a disqualifier of commitment to a mental institution.²⁹⁵ This is how Virginia changed its law, such that those ordered for outpatient treatment would be ineligible to purchase a firearm.²⁹⁶ Although Virginia changed its laws related to outpatient treatment, not all states have followed suit and the ATF has not included this ineligibility in its definition.²⁹⁷

One of the problems with voluntary admission to inpatient treatment is the push by any covering insurance company to discharge the person as soon as possible. Further, courts are under increasing pressure to impose the least restrictive treatment for persons who need intervention in their care due to mental illness.²⁹⁸ Thus, a court may order a person who is dangerous but who has some support system in the community²⁹⁹ to seek outpatient treatment. This could be more therapeutic in the person's course of treatment, and this prevents the ultimate loss of liberty involved in a civil commitment. In other words, we should not be required to remove a person's liberty to assure the person is ineligible to purchase a firearm.

C. *Correcting the Mental Defective Issue*

Finally, the ATF language defining who is ineligible to purchase or possess a firearm should be edited to clearly differentiate between persons with intellectual disabilities and those with dangerous mental illnesses. The use of *adjudicated as a mental defect* is not only outdated, but is (and always should have been deemed) pejorative. This language should be

²⁹⁵ *Frequently Asked Questions: Reporting Mental Health Cases Required by HB 3352*, *supra* note 216.

²⁹⁶ See VA. CODE ANN. § 18.2-308.1:3 (2012) ("It shall be unlawful for any person involuntarily admitted to a facility or ordered to mandatory outpatient treatment . . . involuntarily admitted to a facility or ordered to mandatory outpatient treatment as the result of a commitment hearing . . . or who was the subject of a temporary detention order . . . and subsequently agreed to voluntary admission . . . to purchase, possess or transport a firearm.").

²⁹⁷ See, e.g., FLA. STAT. § 790.065(2)(a)4.b (2012) ("The phrase ["committed to a mental institution"] . . . does not include a person in a mental institution for observation or discharged from a mental institution based upon the initial review by the physician or a voluntary admission to a mental institution.").

²⁹⁸ See, e.g., Andrea M. Odegaard, Note, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 233 (2007).

²⁹⁹ This is odd considering Cho was essentially alone at Virginia Tech. Perhaps the judge thought the school would follow up on his care. Of course, we know that was not true. Not only that, but no one followed up to make sure Cho complied with the court order. REPORT, *supra* note 19, at 49.

updated to reflect what most have understood it to be: a prohibition against a person who, because of mental deficiency or intellectual disability, is unable to manage her affairs. Mental illness should be excluded from this portion of the prohibition.

Updating the *committed to a mental institution* as recommended above in a manner to encompass voluntary admission, temporary observations, and court-ordered outpatient treatment *when there is also a finding of dangerousness* would remove any need to lump persons with mental illness into the first part of this special-risk group.

V. CONCLUSION

The oft-heard phrase, "Guns don't kill people; people kill people" rings true: guns are not the problem; the problem lies in *who* has the guns. The long-standing prohibition against the mentally ill from possessing firearms is now presumed to be constitutional. But simply to say that a person with mental illness is prohibited from possessing a gun is not enough. Nothing prevents that person from legally purchasing a gun in many cases.

Persons with dangerous mental illness might not be formally committed to a mental institution. And whether one has been "adjudicated" as a mental defect varies depending on state statutes and jurisdictional interpretations. Unless and until what it means to be committed is clarified, many more will fall into a loophole, often created by poor insurance coverage, by the ready ability to game the system, or simply by persuasive doctors.

Polarized sides disagree about gun control and gun rights. But this issue is not about removing all guns or allowing all guns. The solution is to clarify our intent: prevent persons with dangerous mental illness from purchasing firearms by requiring persons to obtain a permit or to prove their medical and mental health fitness before acquiring additional firearms. This will not prevent all access of firearms by potentially dangerous persons, but it is a step in the right direction. If it had not been so easy for Jarrod Lee Loughner to buy his gun or for James E. Holmes to buy his, many lives might have been spared.

APPENDIX

Federal NICS 1 Background Chec

