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Mental Health Issues Have on Gun Violence and the Effectiveness
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Political Rhetoric or Effective Public Policy? The Significance Mental Health Issues Have on Gun Violence and the Effectiveness of Laws Aimed to Prevent Mentally Ill Individuals from Accessing Firearms

INTRODUCTION

Despite political rhetoric attributing blame for gun violence on mental health issues, bolstering laws that are aimed towards preventing mentally ill individuals from accessing firearms is not the most effective way to reduce gun violence as a whole. In America, we often don't view gun control through the lens of public health.¹ Instead, we view gun ownership and use as an individual right that may be subject to criminal sanctions under some circumstances.² What separates gun violence from other prominent public health issues – such as tobacco, junk food, and lack of vehicle safety mechanisms – is that firearms are explicitly mentioned in the United States Constitution.³ This difference creates obstacles for those in favor of much stricter gun control laws, which is unlikely to change anytime soon given the language of the Constitution and the current Supreme Court's interpretation of the same.

Even though the laws and regulations that the federal government and states pass concerning gun ownership and use must be deemed Constitutional under the Supreme Court's interpretation of the Second Amendment, this does not mean that lawmakers are powerless to try and reduce gun violence. This is evident from prohibiting certain groups of unqualified individuals from owning firearms, the vast array of regulations relating to licensing and permits for ownership,

¹ Wendy K. Mariner. George J. Annas, Nicole Huberfeld, and Michael R. Ulrich, *Public Health Law* 549, Third Edition (2019).

² *Id.*

³ *Id.*; U.S. Const. amend. II.

and prohibitions on bringing firearms into certain sensitive areas.⁴ Individuals who have been “adjudicated as a mental defective” are one group of prohibited persons.⁵ While preventing such individuals from possessing and using inherently dangerous firearms is sound policy, these laws will not significantly reduce gun violence as a whole, and such a goal would be better served with laws aimed to address other issues.

This paper will begin by examining the language of the Second Amendment and discussing how the Supreme Court has interpreted that language. The second section details the prominence and categories of gun violence in America and describes a brief overview of certain existing gun control laws. The amount of substance and that is contained in gun control is too vast to cover in one paper – e.g. hardware and munitions bans, trafficking, child and consumer safety, and sensitive area restrictions. To make this task more feasible, this paper will focus on background checks and mental health reporting. The third section explains who qualifies as a prohibited person for purposes of mental illness, and discusses differences in state law compelling reporting of mental illness for accurate and complete background checks and certain laws that disarm individuals who might pose a danger to themselves or others. The fourth section discusses the link, or lack thereof, between mental illness and gun violence. While reducing gun violence requires a multi-faceted approach, an overemphasis on the role that mental illness plays into the issue will distract lawmakers from other crucial areas of gun control that require correction. More specifically, the characterization that recent mass shootings are caused by a mental health crisis does not help fix the issue of gun violence.

⁴ *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

⁵ 27 C.F.R. § 478.11.

I. BACKGROUND OF THE SECOND AMENDMENT AND THE SUPREME COURT'S INTERPRETATION OF ITS SCOPE WHEN APPLIED TO GUN CONTROL LAWS

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁶ The language of the second amendment may not seem very straight forward, and for good reason – it isn't. Even Supreme Court Justices have had disagreements on this one sentence's meaning.⁷ However, the majority opinion in *District of Columbia v. Heller*, authored by the late Justice Antonin Scalia, has been the controlling interpretation of the Second Amendment since it was laid down in 2008. In *Heller*, the Court analyzed the Amendment's language under its two separate clauses – the operative clause and the prefatory clause – before applying a standard of review to the challenged law in question.⁸

The operative clause of the Second Amendment refers to portions that states: “[T]he right of the people to keep and bear Arms, shall not be infringed.”⁹ It explains what protections the Amendment affords, rather than why it affords such protections. The Court began analyzing the operative clause by stating who specifically possesses this right.¹⁰ The use of the term “right of the people” led the Court to announce that the Second Amendment is an individual right.¹¹ The Court reasoned that the use of that specific term appeared in other sections of the Constitution, such as the First, Fourth, and Ninth Amendment. These three other Amendments all provide individual

⁶ U.S. Const. amend. II.

⁷ See *District of Columbia v. Heller*, 554 U.S. 570 (2008); *But see Heller*, 554 U.S. 570, (2008) (Stevens, J., dissenting); *Heller*, 554 U.S. 570, (2008) (Breyer, J., dissenting).

⁸ *Heller*, 554 U.S. 570, 578 (2008).

⁹ U.S. Const. amend. II.

¹⁰ *Heller*, 554 U.S. 570, 578 (2008).

¹¹ *Id.* at 580.

rights as opposed to collective rights.¹² It also famously appears in the preamble of the Constitution.¹³ The Court found that “[T]he people seems to have been a term of art”¹⁴ and declared that it refers to all members of the community, not an unspecified subset.¹⁵

Next, the Court defined what protection the Second Amendment afforded to the people. The term “Arms” applies to “weapons that were not specifically designed for military use, and were not employed in a military capacity”.¹⁶ The court analyzed the historical definition and found that it was used in the founding era and throughout this country’s history similarly to our modern-day understanding. It also rejected arguments that the Amendment should only afford protection to arms in existence at the time of the drafting of the Constitution. The Court’s reasoning was again based on a comparison to its interpretation of the protections afforded by the First and Fourth Amendments. More specifically, the Court noted that the First Amendment protects speech in modern forms of communication, and the Fourth Amendment protects against searches conducted through modern technologies.¹⁷ Thus, the weapons that are protected are those “in common use at the time” and exclude those that are “dangerous and unusual.”¹⁸

The only remaining portion of the operative clause is the term “to keep and bear”. The Court in *Heller* stated that these two verbs afforded two different protections to citizens. It found that the most natural reading of the phrase “keep arms” was to “have weapons”.¹⁹ Additionally,

¹² *Id.* at 579.

¹³ U.S. Const. Art. I, § 2.

¹⁴ *Heller*, 554 U.S. 570, 580 (2008) (quoting *United States v. Verdugo-Urguidez*, 494 U.S. 259, 265 (1990)).

¹⁵ *Heller*, 554 U.S. 570, 580 (2008).

¹⁶ *Id.* at 581.

¹⁷ *Id.* at 582; (citing *Reno v. ACLU*, 521 U.S. 844, 849 (1997) and *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001)).

¹⁸ *Id.* at 627.

¹⁹ *Id.* at 582.

the term “bear” means to “carry”. The Court went further, however, and stated that when used with the word “arms” the term refers to “carrying for a particular purpose—confrontation.”²⁰ Interestingly, the Court states that confrontation applies to offensive and defensive action. Justice Ginsburg also shared this interpretation in her dissenting opinion in an earlier case, but in her view, the right only applied to those in the military.²¹ This dispute was the central disagreement of the Justices on the meaning of the prefatory clause that will be discussed shortly.

In sum, the Court found that the operative clause afforded all individuals the right to possess and carry weapons in case of confrontation. This right, according to the Court, was a pre-existing right and “shall not be infringed”.²² As stated in the Introduction, however, the Second Amendment, like others, is not absolute and the Court in *Heller* makes clear that certain long-standing traditions and gun control laws are still valid. The Court explicitly states:

[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, 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.²³

The recognition of the need for limitations of the Second Amendment gives rise to the plethora of regulations discussed later on in this paper.

The operative clause sets forth the substantive right that the Second Amendment provides. It describes who possesses this pre-existing right, what the right permits them to do and what the government is forbidden from doing. A full analysis of the Second Amendment itself, however, would be incomplete without at least addressing the prefatory clause.

²⁰ *Id.* at 584.

²¹ *Id.* (citing *Muscarello v. United States*, 542 U.S. 125, 139-40 (1998) (Ginsburg, J. dissenting)).

²² *Id.* at 592.

²³ *Id.* at 626-27.

“A well regulated militia, being necessary to the security of a free State...”²⁴ The Majority in *Heller* reasoned that this initial clause was written to announce a purpose – although not the only purpose – for which the right was codified by the framers.²⁵ The other purposes for which the framers valued this pre-existing right were for self-defense and hunting.²⁶ It also discussed two parts of the clause and their meaning when applied to the operative clause of the Amendment.

The main point of contention between the Justices in *Heller* was the term “well regulated militia”. The Majority rejected the petitioners’ and Justice Stevens’ position that the prefatory clause limits the right to organized military. Rather, it reasoned that the militia referred to all able-bodied people acting in concert for a common goal and their right to resist tyranny for the security of a free polity.²⁷ The Court went through a lengthy historical analysis of Constitutional history to further justify its holding that the Amendment provides an individual right unconnected to militia service.²⁸ Justice Stevens, who was joined by Justices Souter, Ginsberg, and Breyer, believed that this prefatory clause, along with his interpretation of legislative history, limited the right to military related activity and did not address the use of weapons for self-defense.²⁹ He found it significant that certain state Constitutions express did contain language relating to self-defense.³⁰ Justice Breyer’s dissent would have created an interest-balancing test, where the infringement upon the right to keep and bear arms would have been weighed against the government’s interests in passing

²⁴ U.S. Const. amend. II.

²⁵ *Heller*, 554 U.S. 570, 599 (2008).

²⁶ *Id.*

²⁷ *Id.* at 595-98.

²⁸ *Id.* at 605-19.

²⁹ *Heller*, 554 U.S. 570, 641-42 (2008) (Stevens, J., dissenting).

³⁰ *Id.* at 642.

a particular law.³¹ This approach was also rejected by the majority, which stated “the Second Amendment is the very *product* of an interest balancing by the people...”³²

The Court in *Heller* upheld the lower court’s holding that struck down the law prohibiting the possession of a usable handgun in the home.³³ It stated that the law would have been unconstitutional under any level of scrutiny and stated that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”³⁴ The law in question struck at the core of the Second Amendment, the defense of one’s home. Lower courts have applied the standard of review outlined in *Heller* somewhat differently since its inception.

In *Heller II*, the D.C. Circuit was tasked with determining the constitutionality of another District of Columbia law. This time, the government passed several gun control laws requiring the registration of firearms and prohibiting assault weapons and magazines capable of holding more than ten rounds of ammunition.³⁵ The Court implemented a two-step analysis that other circuits have taken in light of the Supreme Court’s decision in *Heller*.³⁶

The first inquiry was whether or not the provision impinged upon a Second Amendment right. The Circuit Court drew upon the language in *Heller* and stated that long-standing rules are presumptively lawful and do not impinge upon the rights. This presumption can be overcome if the challenger shows the law in question imposes more than a de minimus burden on their rights. Newer laws and regulations do not receive this presumption but are also not presumptively

³¹ *Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

³² *Heller*, 554 U.S. 570, 635 (2008) (emphasis in original).

³³ *Id.* at 636.

³⁴ *Id.* at 635.

³⁵ *Heller v. District of Columbia*, 670 F.3d 1244, 1247-48 (D.C. Cir. 2011).

³⁶ *Id.* at 1252; *See also Tyler v. Hillsdale County Sheriff’s Department*, 837 F.3d 678 (6th Cir. 2016).

invalid.³⁷ If the law does impinge upon the challenger's Second Amendment rights, the next step examines the nature of the regulated conduct and the degree of the burden on those rights.³⁸ This approach determines the level of scrutiny that should be applied and establishes the burden that the state must meet in justifying its law in light of the right's protection.

Nonetheless, this is the approach taken by the D.C. Circuit. Under step one, the Court first addressed the registration requirements under the historical approach to determine if there were longstanding or novel. The Court found that the requirements to register handguns were longstanding and therefore entitled to a presumption of validity. It also stated that the state challenger had not rebutted this presumption by showing that the burden was more than de minimus.³⁹ It found that requirements for registration of "long guns" was not recognized throughout history, and was not entitled to the presumption of Constitutionality. It further found that these regulations did place more than a de minimus burden on the right to keep and bear arms and proceeded to the second step of the analysis. The Court recognized that *Heller* clearly rejected rational basis review, but determined that intermediate scrutiny was appropriate given the degree that the laws limit the possession of firearms and remanded the issue to the District Court.⁴⁰ When it applied this analysis to the prohibition on assault weapons and large-capacity magazines, it found that the law was not longstanding and warranted intermediate scrutiny as opposed to strict scrutiny. The D.C. Circuit found that the law survived intermediate scrutiny and placed significant weight on the government's arguments that semi-automatic rifles could be fired at nearly the same rate as automatic one, and that larger munitions capacity increased the injury and fatality rates in

³⁷ *Heller*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

³⁸ *Id.* at 1256-57.

³⁹ *Id.* at 1254.

⁴⁰ *Id.* at 1256-57.

shootings. It further found that the laws were a reasonable fit to address the government's interest in protecting law enforcement and controlling crime.⁴¹

Another aspect of *Heller II* that is worth noting is the strong dissent written by then D.C. Circuit Judge Brett Kavanaugh. He stated that the approach taken in the case was directly against the holding in *Heller*. More specifically, he was critical that the analysis was extremely similar to the interest balancing approach proposed in Justice Breyer's dissent – which the majority explicitly rejected.⁴² Kavanaugh believed that the second step in the analysis was too subjective. He believed that the Circuit Court was bound to review the constitutionality of the laws through an analysis of text, history, and tradition.⁴³ Kavanaugh then applied the test he considered appropriate and stated that the ban on semi-automatic rifles was unconstitutional.⁴⁴ He further stated that the registration requirements would likely pass intermediate scrutiny but not strict scrutiny and that under the appropriate history and tradition-based test implemented by the Supreme Court, it fails to pass constitutional muster.⁴⁵ Kavanaugh ended his dissent by stating that he was sympathetic towards lawmakers and understood that they were addressing a serious issue in the district. He could not, however, let this sympathy lead him to judicial lawmaking and claimed that he was bound to apply the analysis the Supreme Court laid down in *Heller*.⁴⁶

Both *Heller* and *Heller II* were concerned with attempts by the federal government to implement laws restricting gun ownership and use. Shortly after *Heller*, the Court explicitly stated that this same analysis and rationale applied to state governments' gun control laws.⁴⁷ A 5-4

⁴¹ *Id.*

⁴² *Id.* at 1276-77 (Kavanaugh, J., dissenting).

⁴³ *Id.* at 1278.

⁴⁴ *Id.* at 1285.

⁴⁵ *Id.* at 1295.

⁴⁶ *Id.* 1295-96.

⁴⁷ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Majority, once again, found that Privileges and Immunities Clause of the Fourteenth Amendment was not simply anti-discrimination protection, and incorporated the Second Amendment's fundamental right to keep and bear arms.⁴⁸ Thus, state and local governments will face the same obstacles in passing gun control laws as the federal government.

While the Second Amendment and Supreme Court's interpretation of the same create a limit on the extent that lawmakers can limit gun access and ownership, the language used in *Heller*, and the more lenient approach taken by lower courts, leaves amply room for the vast body of gun control laws that exist today. The next section of this paper will begin by briefly discussing how severe the problem of gun violence in America is by looking at statistics used by the Center for Disease Control. It will then discuss the development of one key aspect of gun control law related to preventing mentally ill individuals from obtaining firearms – background checks.

II. AN OVERVIEW OF GUN VIOLENCE IN AMERICAN AND THE DEVELOPMENT OF BACKGROUND CHECKS

A. The Prominence of Gun Violence in America

The United States accounts for a disproportionate share of global gun violence when compared to the size of its population. Although the American population comprises only 4% of the global population, 35% of firearm-related suicides and 9% of firearm-related homicides occur in the United States.⁴⁹ The gun-related homicide rate in America is 25 times higher when compared to other high-income countries.⁵⁰ The gun-related suicide rate was almost 10 times higher as well.⁵¹ American culture, tradition, and most important for lawmakers the Second

⁴⁸ *Id.* at 750.

⁴⁹ Mohsen Naghavi, et al., "Global Mortality from Firearms, 1990–2016," *The Journal of the American Medical Association* 320, no. 8 (2018): 792–814.

⁵⁰ Erin Grinshteyn and David Hemenway, "Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015," *Preventive Medicine* 123, (2019): 20–26.

⁵¹ *Id.*

Amendment, are all likely contributing factors as to why gun violence is more prevalent in this country as opposed to others. It is also likely why traditionally gun violence has not been viewed through the traditional lens of public health.⁵² But increased attention to just how wide this discrepancy is has caused an outcry of citizens and politicians for more stringent gun laws.

In American, there are roughly 36,000 gun-related deaths per year – or 100 per day.⁵³ 2017 was a high point in the past 40 years with gun-related deaths totaling 39,773.⁵⁴ Between 2014 and 2017, the total number of gun related fatalities rose by 16%. Approximately 61% of all gun-related fatalities are suicides while 35% are homicides. The remaining percentage is attributed to law enforcement fatalities and unintentional deaths.⁵⁵ While these numbers seem staggering, the number of firearms that are in the United States (excluding black market or illegal firearms) makes these figures more believable. Thirty percent of Americans say that they own a gun, while another 11% say that they live with someone who does.⁵⁶ There are over 393,000,000 million civilian-owned firearms – for a population of just over 329,883,000.⁵⁷ Yes, there are more guns than people. This amazing number of firearms has been subject to “long standing” gun control laws that the

⁵² Wendy K. Mariner, George J. Annas, Nicole Huberfeld, and Michael R. Ulrich, *Public Health Law* 549, Third Edition (2019).

⁵³ Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), “Fatal and NonFatal Injury Data,” last accessed Feb. 20, 2019, <https://www.cdc.gov/injury/wisqars>. Figures represent an average of the five years of most recent available data: 2013 to 2017.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ John Gramlich and Katherine Schaeffer, “7 facts about guns in the U.S.” Pew Research, Fact Tank News in the Numbers, published October 22, 2019, <https://www.pewresearch.org/fact-tank/2019/10/22/facts-about-guns-in-united-states/>

⁵⁷ See Christopher Ingraham, “There are more guns than people in the United States, according to a new study of global firearm ownership”, The Washington Post, June 12, 2018. *citing* Small Arms Survey, by the Graduate Institute of International Development Studies in Geneva; See also United States Census Bureau, “U.S. and World Population Clock” last accesses October 25, 2019.

Supreme Court made reference to in *Heller*, and which legislatures continue to increase and change to better reduce gun violence while adhering to Second Amendment rights.

B. Existing Federal and State Laws on Background Checks

As stated in the introduction, the substance of and variety of gun control laws is simply too vast to cover in one paper. This section will focus instead on the use of background checks – which are the key to making mental health reporting effective. Mental health reporting and red flag laws will be covered in more detail in the next section, while the history and a brief overview of background checks will be addressed here.

The Gun Control Act of 1968 laid down some key aspects of gun control law on the federal level.⁵⁸ The Act prohibits anyone except people with federal firearms licenses (FFL) from being “engaged in the business” of importing, manufacturing or dealing firearms or ammunition.⁵⁹ The phrase “engaged in the business” is defined as “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.”⁶⁰

The Gun Control Act also prevents certain prohibited persons from obtaining firearms. The Act lists eight qualifying events/conditions that would classify someone as a prohibited person: (1) persons convicted of crimes punishable by terms exceeding one year, (2) fugitives, (3) users or those addicted to controlled substances, (4) those who have been adjudicated as a “mental defective”, (5) illegal aliens of the United States, (6) former military members who have been dishonorably discharged, (7) those who have renounced citizenship, and (8) those who have been

⁵⁸ Wendy K. Mariner. George J. Annas, Nicole Huberfeld, and Michael R. Ulrich, *Public Health Law 600*, Third Edition (2019).

⁵⁹ 18 U.S.C § 921(a).

⁶⁰ 18 U.S.C § 921(a)(21)(C).

convicted of domestic violence or are under a restraining order for domestic violence.⁶¹ The prohibition on selling firearms to those adjudicated as a mental defective will be discussed more in the next section of this paper.

The next major development came in 1993 when Congress passed the Brady Handgun Violence Act. The Act added the requirement that all dealers with FFLs conduct background checks before selling a firearm or ammunition.⁶² These background checks are run through the National Instant Criminal Background Checks System (NICS), which is maintained by the FBI.⁶³ In 90% of the cases, these background checks are resolved immediately and are not a burdensome requirement to meet.⁶⁴ The Act originally included an interim requirement that states make “reasonable efforts” to verify information provided to them from dealers while NICS was set up.⁶⁵ The Court struck down these requirements under the anti-commandeering doctrine – holding that Congress cannot conscript state and local officials to carry out federal laws.⁶⁶ Since NICS has been developed and implemented, however, background checks have been an effective tool for preventing prohibited persons from obtaining firearms. Since 1994, over 3,000,000 people legally prohibited for obtaining a firearm have been stopped by NICS.⁶⁷ 35% of those people were convicted felons.⁶⁸

⁶¹ 18 U.S.C § 922(g).

⁶² 18 U.S.C. § 922(t).

⁶³ Wendy K. Mariner, George J. Annas, Nicole Huberfeld, and Michael R. Ulrich, *Public Health Law* 601, Third Edition (2019).

⁶⁴ “National Instant Criminal Background Check System Celebrates 20 Years of Service,” Federal Bureau of Investigation, Criminal Justice Information Services, November 30, 2018.

⁶⁵ Mariner, et al. at 605-06.

⁶⁶ *Printz v. United States*, 521 U.S. 898 (1997).

⁶⁷ Jennifer Karberg, et al., “Background Checks for Firearm Transfers, 2015—Statistical Tables,” US Department of Justice: Bureau of Justice Statistics (2017).

⁶⁸ *Id.*

The Brady Act also prohibits any individual who doesn't have an FFL from transporting or receiving a firearm in the state where they reside if the firearm was obtained in another state, and from delivering a firearm to an unlicensed person in another state.⁶⁹ An amendment in 2004 required that background checks be destroyed within 24 hours.⁷⁰

The distinction as to who is required to obtain a license is a major loophole in existing federal law. Unlicensed sellers are allowed to make private sales online or at gun shows without conducting any kind of background check.⁷¹ Roughly 80% of all firearms used for crimes are purchased through unlicensed sellers.⁷² Some states have passed laws to address this problem.

Twelve states – California, Colorado, Connecticut, Delaware, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia – have extended federal law to require background checks at the “point of transfer” even if the seller is unlicensed.⁷³ These laws vary slightly but all aim to close the loophole left open in federal law for purchases from unlicensed sellers. For example, Maryland

⁶⁹ 18 U.S.C. § 922(a)(3).

⁷⁰ Mariner, et al. at 601-02.

⁷¹ <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/>

⁷² Katherine A. Vittes, Jon S. Vernick, and Daniel W. Webster, “Legal Status and Source of Offenders’ Firearms in States with the Least Stringent Criteria for Gun Ownership,” *Injury Prevention* 19, no. 1 (2013): 26-31.

⁷³ Cal. Penal Code §§ 27545, 27850-28070; Colo. Rev. Stat. § 18-12-112; 2013 Colo. H.B. 1229. See also Colo. Rev. Stat. §§ 12-26.1-101 – 12-26.1-108; Conn. Gen. Stat. §§ 29-33(c), 29-36(f), 29-37a(e)-(j). 2013 Ct. ALS 3. See also Conn. Gen. Stat. § 29-37g; Del. Code tit. 11, § 1448B, tit. 24, § 904A; Md. Code Ann., Pub. Safety §§ 5-101(t), 5-124; 2019 NV SB 143; N.J. Stat. Ann. § 2C:58-3; 2019 NMS 8; N.Y. Gen. Bus. Law § 898. 2013 NY ALS 1. See also N.Y. Gen. Bus. Law §§ 895-897; N.Y. Penal Law § 400.00; Or. Rev. Stat. § 166.435; 18 Pa. Cons. Stat. § 6111(b), (c), (f)(2); R.I. Gen. Laws §§ 11-47-35 – 11-47-35.2; Vt. Stat. Ann. tit. 13, § 4019, enacted by 2017 SB 55, Sec. 6; Rev. Code Wash. § 9.41.113; D.C. Code Ann. § 7-2505.02.

and Pennsylvania’s point of transfer laws pertain to handguns only and excludes long guns.⁷⁴ Nine of these states generally require all transfers to be conducted or processed through a dealer with an FFL.⁷⁵ Three states – Hawaii, Illinois, and Massachusetts – addressed the gap of unlicensed sellers differently and require all prospective buys to obtain a permit.⁷⁶ Iowa, Michigan, Nebraska, and North Carolina require permits for handguns only.⁷⁷ Many states have a point of transfer and permit requirement (some have permit requirements for only handguns but not long guns).⁷⁸

These initiatives undertaken by the states discussed above are a step in the right direction towards reducing gun violence. Background checks are the only way to ensure that a prospective firearm purchaser is not a prohibited person under the Gun Control Act. The Supreme Court has stated that while most people are entitled to exercise their Second Amendment rights, Congress and state legislatures are equally justified in excluding prohibited persons such as felons and mentally ill individuals from obtaining firearms.⁷⁹ Activists for more stringent gun control laws, like the Giffords Law Center to Prevent Gun Violence, advocate that states should require all

⁷⁴ Giffords Law Center To Prevent Gun Violence, “Universal Background Checks” <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/#state>.

⁷⁵ *Id.* (these states are California, Colorado, Delaware, Nevada, New Jersey, New York, Oregon, Vermont, and Washington).

⁷⁶ Haw. Rev. Stat. Ann. §§ 134-2, 134-13; 430 Ill. Comp. Stat. 65/1 – 65/15a, 720 Ill. Comp. Stat. 5/24-3(k); Mass. Gen. Laws ch. 140, §§ 121, 129B, 129C, 131, 131A, 131E, 131P.

⁷⁷ Iowa Code §§ 724.15 – 724.20; Mich. Comp. Laws §§ 28.422, 28.422a; Neb. Rev. Stat. Ann. §§ 69-2404, 69-2407, 69-2409; N.C. Gen. Stat. §§ 14-402 – 14-404.

⁷⁸ Giffords Law Center To Prevent Gun Violence, “Universal Background Checks” <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/#state>. (referencing Connecticut, District of Columbia, Maryland, New Jersey, New York, and Rhode Island).

⁷⁹ *Heller* at 626-27.

purchases to be conducted through licensed dealers.⁸⁰ The next section will look at who qualifies as a prohibited person because they have been adjudicated as a mental defective.

III. FEDERAL AND STATE LAW PROHIBITING MENTAL ILL INDIVIDUALS FROM ACCESSING FIREARMS AND RED FLAG LAWS

As with the federal law on background checks, the federal requirements for mental health reporting are far from an airtight system. Because of the anti-commandeering doctrine, the federal government cannot compel states to submit information on individuals' mental health status to NICS.⁸¹ Furthermore, the federal definition of mental illness that overcomes an individual's Second Amendment rights does not cover certain people known to have displayed signs of mental illness.⁸² One study that examined 62 mass shootings between 1982 and 2012 found that 38 of the shooters displayed troubling signs of illness before committing the devastating acts.⁸³ Despite these symptoms, these people did not meet the Gun Control Act's definition of mental impairment, however. And like the loophole in background checks, some states have extended federal law on what qualifies as a triggering event for mental health reporting.

The controlling federal law defining who qualifies as a prohibited person is the Gun Control Act. As stated above, the act prohibits anyone who "has been adjudicated as a mental defective or committed to any mental institution" from purchasing arms.⁸⁴ This is further

⁸⁰ Giffords Law Center To Prevent Gun Violence, "Universal Background Checks" <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/#state>.

⁸¹ *Printz v. United States*, 521 U.S. 898 (1997).

⁸² Educational Fund to Stop Gun Violence, *Guns, Public Health, and Mental Illness: An Evidence-Based Approach for State Policy* (Dec. 2013).

⁸³ Mark Follman, *Mass Shootings: Maybe What We Need Is a Better Mental-Health Policy*, *Mother Jones* (Nov. 9, 2012).

⁸⁴ 18 U.S.C. § 922(d)(4).

expounded upon in the federal regulations, which define the term adjudicated as a mental defective as:

- (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) This 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 ... (citations omitted)⁸⁵

This section covers those who are involuntarily committed, but not those who check themselves into mental health facilities for observation.⁸⁶

The first hurdle that gun control activists had to overcome was to increase state reporting to NICS. The background check is only effective if states participate in the reporting process; otherwise, people who are dangers to themselves or others can pass a background check and obtain firearms. The most infamous example of this occurring was the Virginia Tech shooting in 2007.⁸⁷ The NICS Improvement Act of 2007 was Congress's answer to this issue. The Act provided financial awards and penalties to encourage states to provide information to NICS – including information on individuals who have been adjudicated as mentally ill.⁸⁸ It also created a grant system that states could use to set up their own reporting and background checks systems,

⁸⁵ 27 C.F.R. § 478.11.

⁸⁶ 27 C.F.R. § 478.11.

⁸⁷ Giffords Law Center To Prevent Gun Violence, “Mental Health Reporting” <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/#federal> (see footnote 3, the shooter had been found by a Virginia special judge to be an immediate danger to himself in 2005 and ordered he seek outpatient treatment).

⁸⁸ Pub. L. No. 110-180, §§ 102, 104, 121 Stat. 2559 (2008).

which some states opted into.⁸⁹ Other mass shootings like the Virginia Tech tragedy had brought light of this issue and increased the amount of voluntary mental health reporting on the part of the states.⁹⁰ The number of mental health records contained in NICS increased by roughly 700% between 2007 and 2014.⁹¹

States have varied with their individual cooperation, with some contributing more than others in terms of NICS mental health reporting. Thirty-four states have passed laws that require their courts to provide information to NICS when a person is committed, either directly or through a state agency.⁹² Six states authorize disclosure to NICS but explicitly decline to make

⁸⁹ *Id.* at § 103; U.S. General Accounting 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 (July 2012).

⁹⁰ Congressional Gun Violence Prevention Task Force, *It's Time to Act: A Comprehensive Plan That Reduces Gun Violence and Respects the 2nd Amendment Rights of Law-Abiding Americans* (Feb. 7, 2013).

⁹¹ Criminal Justice Information Services Division of the Federal Bureau of Investigation, U.S. Dep't of Justice, *Active Records in the NICS Index As of April 30, 2018*.

⁹² Ala. Code § 22-52-10.8; 2013 AK H.B. 366; Ariz. Rev. Stat. §§ 13-609, 13-925, 36-540, 14-5304; Cal. Penal Code § 28220; Conn. Gen. Stat. §§ 17a-500(b), (c)(2), 29-36f(b)(8), 29-36l, 29-38b; Ga. Code Ann. §§ 16-11-172(b), 35-3-34(e); Ga. Comp. R & Regs. 140-2-.17; 2014 HI. H.B. 2246, Haw. Rev. Stat. Ann. §§ 134-3.5, 334-2.5(c)(4); 334-60.2, 704-406, 704-411; Idaho Code Ann. §§ 67-3003(1)(i), 66-356, 9-340A(2), 9-340C(6), (13); 405 Ill. Comp. Stat. 5/6-103.1, 5/6-103.2, 5/6-103.3; 430 Ill. Comp. Stat. 65/3.1, 65/4(a)(3), 65/8.1; 740 Ill. Comp. Stat. 110/12(b); Ind. Code Ann. §§ 11-10-4-3(e), 12-26-6-8(g), 12-26-7-5(c), 33-24-6-3(a)(8), 35-36-2-4(e), 35-36-2-5(f), 35-36-3-1(c); Iowa Code §§ 690.4, 692.17, 724.17, 724.31; Kan. Stat. Ann. §§ 59-2946, 59-2966, 75-7c25; Ky. Rev. Stat. § 237.108; Me. Rev. Stat. tit. 25, § 1541(3)(c), tit. 34-B, § 3864(12); Md. Code, Pub. Safety § 5-133.2; Md. Code, Health-Gen. § 10-605; Md. Code, Crim. Proc. §§ 3-106(h), 3-112(d); 2013 MA H.B. 4376; Mass. Gen. Laws ch. 123, § 36; ch. 140, §§ 129B(2), 131(e); Minn. Stat. §§ 245.041, 253B.09, 253B.24, 624.713; Miss. Code Ann. §§ 9-1-49, 45-9-103; Nev. Rev. Stat. Ann. §§ 159.0593(1), 174.035(8), 175.533(3), 175.539(4), 178.425(6), 179A.163(1), 179A.165(1), 433A.310(4), (5); N.J. Stat. Ann. §§ 2C:58-3, 30:4-24.3, 30:4-24.3a; N.J. Admin. Code §§ 10:7-7.1, 13:54-1.4 – 13:54-1.6; N.M. Stat. Ann. § 34-9-19; N.Y. Penal Law §§ 400.00(4), 400.03(5)-(6); N.Y. Crim. Proc. Law §§ 330.20, 730.60; N.Y. Mental Hyg. Law §§ 7.09(j), 9.11, 9.46, 13.09(g), 31.11(5), 33.13(b), (c); N.Y. Exec. Law § 837(19); N.Y. Jud. Law § 212(2)(q); N.C. Gen. Stat. §§ 122C-54(d1), (d2), 122C-54.1, 14-404(c1); N.D. Cent. Code § 62.1-02-01.2; 2013 OK S.B. 1845 (to be codified as Okla. Stat. tit. 21 § 1290.27); Or. Rev. Stat. §§ 166.412, 166.432, 181.740, 426.130, 426.160, 427.293; Or. Admin. R. 257-010-0060; 2013 RI H.B. 7939; S.C. Code Ann. §§ 23-31-1010, 23-31-1020.

such reporting mandatory.⁹³ Lastly, four states authorize or require collecting mental health records for in-state databases without commenting on disclosures to NICS.⁹⁴ The time frame in which the reporting must be done varies by state, and can fall anywhere between immediately, to one month, to “promptly”.⁹⁵

All of those states that require disclosure do so when an individual falls under the federal definition of mentally ill – adjudicated as defective and committed to an involuntary inpatient facility. While many states use definitions that are similar to the federal language for their purposes of a prohibited person for reasons of mental illness, 22 states go even further and require disclosure when an individual has been involuntarily ordered to attend outpatient treatment.⁹⁶ California requires that licensed psychotherapists report any instance when they believe someone is a danger to a reasonably identifiable victim to law enforcement.⁹⁷ Similarly, New York requires any mental health professional to report an individual who they seriously consider a danger to commit harm to others or self-harm.⁹⁸ Illinois’s law places a responsibility

See 2013 S.C. Acts 22 (Signed May 3, 2013); 2014 S.D. H.B. 1229 (signed by the Governor March 14, 2014); Tenn. Code Ann. §§ 16-1-117(a), 16-3-812, 16-10-213(b), (c), 16-11-206(b), (c), 16-15-303(g), 16-16-120(b), 33-3-115, 33-3-117; Tex. Gov’t Code §§ 411.052, 411.0521; Va. Code Ann. §§ 19.2-169.2, 19.2-389, 19.2-390, 37.2-819, 64.2-2014; Wash. Rev. Code Ann. §§ 9.41.047, 9.41.090, 9.41.094, 9.41.097, 10.97.030(4), 10.97.045, 71.05.390(17), 71.34.340(16); Wis. Stat. §§ 51.20(13)(cv)(4), 175.35(2g)(d)(1).

⁹³ Colo. Rev. Stat. §§ 13-5-142, 13-9-123, 15-14-102, 18-4-412(4), 19-1-304; Fla. Stat. Ann. § 790.065(2)(a)(4); Neb. Rev. Stat. Ann. § 69-2409.01; Mo. Rev. Stat. §§ 43.503(6), 552.030(7), 610.120(1), 630.140(5); 18 Pa. Cons. Stat. §§ 6109(i.1), 6111.1; 50 Pa. Stat. Ann. §§ 7109, 7111; 37 Pa. Code §§ 33.103(e), 33.120; W. Va. Code §§ 27-5-4(c)(3), 61-7A-2, 61-7A-3.

⁹⁴ Ark. Code Ann. §§ 5-2-302, 5-2-310(b), 5-2-314, 12-12-209, 20-47-214, 20-47-215; Mich. Comp. Laws §§ 28.243(9), (10), 330.1464a, 700.5107, 769.16a – 769.16b; Ohio Rev. Code § 5122.311; Utah Code Ann. § 53-10-208.1.

⁹⁵ Giffords Law Center To Prevent Gun Violence, “Mental Health Reporting”, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/mental-health-reporting/#federal>

⁹⁶ *Id.*

⁹⁷ Cal. Welf. & Inst. Code §§ 8100, 8105.

⁹⁸ N.Y. Mental Hyg. Law § 9.46; N.Y. Exec. Law § 837(19).

on not just mental health professionals, but also law enforcement and school administrators. If they determine that an individual is “a clear and present danger” to self or others they must report the person.⁹⁹

The following states prohibit possession of firearms for those who voluntarily enter a mental health hospital within certain time periods: Connecticut (six months), Illinois (until certified that they are not dangerous), Maryland (until receiving “relief” from disqualification), and The District of Columbia (five years).¹⁰⁰

Aside from restricting mentally ill individuals from purchasing firearms, what is the proper legal recourse when an individual already has a firearm and then develops or shows signs of mental illness? More importantly, what if they become a danger to themselves or others? Federal law provides no solution for disarming those who are dangerous but have not been adjudicated as a mental defective.¹⁰¹ This has raised the issue of “red flag laws” or extreme risk protective orders (ERPO) on the state level – especially in light of recent mass shootings.¹⁰² They work by allowing families, household members, or law enforcement officials to petition directly for an ERPO to confiscate the individual’s firearms.¹⁰³

⁹⁹ 2013 Ill. ALS 63 §§ 105, 145, 150.

¹⁰⁰ Giffords Law Center to Prevent Gun Violence, “Categories of Prohibited People”, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/categories-of-prohibited-people/>

¹⁰¹ Giffords Law Center To Prevent Gun Violence, “Extreme Risk Protective Orders”, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#state>

¹⁰² Timothy William, “What are ‘Red Flag’ Gun Laws, and How do they Work” The New York Times, (August 6, 2019)

¹⁰³ Giffords Law Center To Prevent Gun Violence, “Extreme Risk Protective Orders”, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/extreme-risk-protection-orders/#state>

Seventeen states and the District of Columbia have some version of red flag laws. They vary in who is allowed to petition – whether it is law enforcement, family or household members, or any individual. They also vary on the burden of proof the petitioner must meet in order for an *ex parte* ERPO (an emergency order without the individual given an opportunity to be heard) to be issued at its inception, and then for a final order after the individual has had time to be heard and rebut any evidence of the petitioner.¹⁰⁴ *Ex parte* orders are issued without an individual being present because the danger is shown to be imminent. There is also a fair degree in the variation of how long the original *ex parte* ERPO is valid and until a hearing is conducted.¹⁰⁵ If a final order is signed, they last for a specified time of anywhere from six months, to one year, to indefinitely. These orders generally have a higher burden of proof¹⁰⁶.

Proponents of these laws claim that they are extremely effective at saving lives. One study has suggested that 80% of people contemplating suicide give some sign.¹⁰⁷ Another FBI study of active shooters found that individuals who commit the acts give between four and five signs of concerning behavior over time.¹⁰⁸ Critics, like the National Rifle Association, argue that the laws give courts too much power to confiscate weapons when the individuals have committed no crime and are not been able to defend themselves, essentially violating their due process rights.¹⁰⁹ Law enforcement officials have said that their effectiveness is difficult to quantify, as nobody can tell how many lives were saved.¹¹⁰

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ “Suicide,” Mental Health America, mhanational.org.

¹⁰⁸ James Silver, Andre Simons, and Sarah Craun, “A Study of the Pre-Attack Behaviors of Active Shooters in the United States,” Federal Bureau of Investigation (June 2018).

¹⁰⁹ Timothy William, “What are ‘Red Flag’ Gun Laws, and How do they Work?” The New York Times (August 6, 2019).

¹¹⁰ *Id.*

This debate is unlikely to become any less relevant given the frequency and publicity of tragic mass shootings, even though, suicides account for a much larger proportion of gun violence.

IV. THE LINK, OR LACK THEREOF, BETWEEN MENTAL ILLNESS AND GUN VIOLENCE

The link between mental illness and gun violence has unfortunately been the subject of political rhetoric in the wake of mass shootings.¹¹¹ In fact, the President Trump made statements in the wake of the mass shootings that occurred in El Paso and Dayton earlier this year where he stated, “Mental illness and hatred pulled the trigger. Not the gun.”¹¹² A popular news outlet has even stated that the current administration was briefed on the possibility of monitoring individuals with mental illnesses to detect if they will turn violent through their cell phones and smart watches.¹¹³ Aside from the probably fourth amendment claims that would arise from such an idea, current technology and practical limitations of checking each alert would make such a proposal impossible.

One study suggests, however, that mass shootings perpetrated by people with serious mental illnesses account for less than 1% of annual totals. That study also suggests that individuals with serious mental illness commit only about 3% of all violent crimes – and even less than that involves firearms.¹¹⁴ Another study suggests that most mental health symptoms

¹¹¹ Jamie Ducharme, “Politicians Keep Blaming Mass Shootings on Mental Health. Doctors Say They’re Wrong.” *Time*, (August 5, 2019).

¹¹² John Wagner and Felicia Sonmez, “Trump condemns white supremacy, focuses on combating mental illness over new gun-control measures”, *The Washington Post* (August 5, 2019).

¹¹³ *Id.*

¹¹⁴ James L Knoll, M.D. and George D. Annas, M.D., M.P.H. “Mass Shootings and Mental Illness” American Psychiatric Association Publishing (2016).

were unrelated to gun violence. When controlling for demographic and gun-related variables, hostility was the most significant factor that was linked with threatening another person with a firearm. While hostility is a symptom of some forms of mental illness it can also be a general personality trait.¹¹⁵ This same study defines hostility as “a devaluation of the worth and motives of others, an expectation that others are likely sources of wrongdoing, a relational view of being in opposition towards others, and a desire to inflict harm or see others harmed.”¹¹⁶ Although mental illness has many different forms and symptoms, there is no way to determine if hostility and hatred are not simply characteristics of bad people as opposed to those who are ill.

Men perpetrate Ninety-seven percent of mass shootings.¹¹⁷ Additionally, the majority of the shooters are white.¹¹⁸ Beyond this, they are clearly common as shooter’s motives can range from sexual frustration to racial and ethnic hatred.¹¹⁹ It is difficult to address a problem when there is not clear diagnosis.

A more effective way to reduce such terrible events may be to fund research that helps legislatures understand what behaviors are linked to individuals who commit mass shootings. In

¹¹⁵ Yu Lu, Jeff R. Temple, “Danger weapons or dangerous people? The temporal associations between gun violence and mental health”, *Preventative Medicine*, Volume 122, p. 1-6 (April 2019).

¹¹⁶ Yu Lu, Jeff R. Temple, “Danger weapons or dangerous people? The temporal associations between gun violence and mental health”, *Preventative Medicine*, Volume 122, p. 1-6 (April 2019) (citations omitted).

¹¹⁷ Statista, “Number of mass shootings in the United States between 1982 and August 2019, by shooter’s gender.” (graph indicating the listed statistic).
<https://www.statista.com/statistics/476445/mass-shootings-in-the-us-by-shooter-s-gender/>

¹¹⁸ Statista, “Number of mass shootings in the United States between 1982 and August 2019, by shooter’s race and ethnicity.” (graph).
<https://www.statista.com/statistics/476456/mass-shootings-in-the-us-by-shooter-s-race/>

¹¹⁹ Natasha Bhuyan, M.D., “Don’t Blame Mental Health for Mass Shootings”, *American College for Physicians* (September 18, 2019).

the 1990s, Congress passed the Dickey Amendment in annual appropriations legislation.¹²⁰ The Amendment conditioned all of the funds made available to the CDC for injury prevention could not be used to advocate or promote gun control.¹²¹ After so much outcry in the wake of mass shooting in recent years, Congress in 2018 passed the appropriations bill with the Dickey Amendment still included, but also passed an accompanying report states that the Center for Disease Control now has the authority to research the causes of gun violence.¹²² Perhaps now more detailed research on what causes gun violence as a whole – and more specifically what factors contribute to mass shootings may be done. These empirical studies, combined with fixing the loopholes of the FLL definition and other trafficking concerns, might make law makers more informed about the causes of gun violence and allow them to introduce more effective laws combating the same.

CONCLUSION

Keeping firearms out of the hands of the mentally ill is a common-sense approach to reducing gun violence as a whole. Because people with mental illnesses likely account for such a small percentage of violent crime, focusing too much on laws geared towards preventing them from accessing weapons may cause politicians to ignore other underlying causes of the public health dilemma. Perpetuating a belief that all individuals with mental illness are dangerous also stigmatizes and is harmful to those already battling some form of mental illness. It diverts attention away from developing more effective methods of reducing gun violence.¹²³

¹²⁰ Allen Rostron, “The Dickey Amendment on Federal on Federal Funding for Research on Gun Violence: A Legal Dissection”, *Am J Public Health*, (July 2018).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 94-97.

The use of red flag laws can be used to disarm those with disturbing behavior. The behavior that increases the risk of mass shootings may be unrelated to that of mental illness or any psychiatric diagnosis.¹²⁴ Funding towards studies to examine the underlying causes of gun violence, even identifying certain personality traits such as hostility, could give lawmakers a better understanding of this complex issue. Although the causes of gun violence are unlikely to be boiled down into easy to address factors, research on the issue will be helpful to identify a more complete picture of the issue.

Red flags laws are also likely to prevent suicides through firearms, which account for nearly two-thirds of all gun related deaths. Some sources estimate that 6.7% of Americans are affected by major depressive disorder and 3.5% by posttraumatic stress disorder.¹²⁵ It is hard to imagine that filing an ERPO with a court is an easy or practical thing for a loved one to do. It does appear to be one safeguard that family or household members can turn to if they truly feel that an individual is going to commit suicide.

From the available research already conducted two things appear evident. The first is that the primary focus of state legislatures at this junction might be better served by closing the private seller loophole for NICS background checks. The second, that politicians diverting attention away from research on gun control by blaming mental health for mass shootings is not helping the problem.

¹²⁴ *Id.* at 98-99.

¹²⁵ Anxiety and Depression Association of America, “Facts and Statistics.”