

## Why Wait Until the Crime Happens? Providing for the Involuntary Commitment of Dangerous Individuals Without Requiring a Showing of Mental Illness

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Most violence is not committed by persons with mental illness . . . . Attempts that aim to prevent events like those that took place at Columbine and Virginia Tech by focusing on detection and intervention among persons with severe mental illness will not make society much safer.<sup>1</sup>

Although in the past social scientists and psychiatrists have consistently overestimated their abilities to predict violence and to identify dangerousness, our knowledge may have progressed to the point that we can now accurately predict violence and identify dangerousness in specific circumstances.<sup>2</sup>

I. INTRODUCTION

The vast majority of states require that, for purposes of involuntary commitment, an individual must: (1) have a mental illness and

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<sup>1</sup> Douglas Mossman, *The Imperfection of Protection Through Detection and Intervention*, 30 J. LEGAL MED. 109, 136 (2009). Mossman further states that “one can give many solid (and better) reasons for treating mental illness besides reducing violence, and mental illness contributes to just a small fraction of the violence that Americans experience.” *Id.* at 140.

<sup>2</sup> John Parry, *Involuntary Civil Commitment in the 90s: A Constitutional Perspective*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 320, 321 (1994).

(2) present an imminent or substantial danger to himself or herself or others.<sup>3</sup> The problem with this standard is that it leaves open the possibility for non-mentally ill individuals to commit horrific acts of violence because, without such illness, they would not meet the standard for involuntary commitment. Based upon numerous empirical studies, mental illness, in and of itself, does not bear a significant causal relationship to violent behavior.<sup>4</sup> In fact, mental illness is only a causal factor in violent behavior when it is accompanied by and co-occurs with another factor known to have a causal relation to violence, such as substance abuse.<sup>5</sup>

Furthermore, empirical studies have identified a substantial amount of environmental and biological factors—such as frontal lobe disorder and other brain injuries—that are causally related to violent acts, and it is these and other factors that should be incorporated into modern statutory schemes governing involuntary civil confinement.<sup>6</sup> Otherwise, individuals that may be biologically prone to violence—or may become violent based upon environmental factors—can and will commit acts of violence because there exists no means of intervention or detection before the crime happens.<sup>7</sup>

<sup>3</sup> See, e.g., ALASKA STAT. ANN. § 47.30.755(a) (West 2010); ARIZ. REV. STAT. ANN. § 36-540(A) (2011) (West); CAL. WELF. & INST. CODE § 5250 (West 2010); COLO. REV. STAT. ANN. § 27-65-105(1)(a)(I) (West 2011); DEL. CODE ANN. tit. 16 § 5010 (West 2010); D.C. CODE § 21-545(b)(2) (2011); GA. CODE ANN. § 37-3-1(9.1) (West 2010).

<sup>4</sup> See JULIO ARBOLEDA-FLÓREZ ET AL., PUB. HEALTH AGENCY OF CAN., MENTAL ILLNESS AND VIOLENCE: PROOF OR STEREOTYPE? (1996), available at [http://www.phac-aspc.gc.ca/mh-sm/pubs/mental\\_illness/index-eng.php](http://www.phac-aspc.gc.ca/mh-sm/pubs/mental_illness/index-eng.php); Hon. Cynthia Loo, *Predicting Violence in the Mentally Ill*, CRIM. DOCKET (July 2007), <http://www.lacba.org/showpage.cfm?pageid=8032>; *Drugs and Alcohol, Not Mental Illness, Explains Violent Crime Risk*, U. OXFORD (Sept. 7, 2010), [http://www.ox.ac.uk/media/news\\_stories/2010/100907.html](http://www.ox.ac.uk/media/news_stories/2010/100907.html); John M. Grohol, *Dispelling the Myth of Violence and Mental Illness*, PSYCHCENTRAL (June 1998), <http://psychcentral.com/archives/violence.htm>; *Violence and Mental Illness*, CANADIAN MENTAL HEALTH ASS'N, [http://cmha.ca/bins/content\\_page.asp?cid=3-108](http://cmha.ca/bins/content_page.asp?cid=3-108) (last visited Apr. 25, 2011).

<sup>5</sup> Loo, *supra* note 4.

<sup>6</sup> See Dawn J. Post, *Preventative Victimization: Assessing Future Dangerousness in Sexual Predators for Purposes of Indeterminate Civil Commitment*, 21 HAMLIN J. PUB. L. & POL'Y 177, 207–08 (1999) (including a non-exhaustive list of causal factors such as “age, sex, race, social class, history of alcohol or opiate abuse, educational attainment, . . . residential and employment stability . . . and statistics of violence in the offender’s demographic”).

<sup>7</sup> See Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 LAW & CONTEMP. PROBS. 301, 332–37 (discussing biological factors that may be causally related to violence). The authors explain as follows:

All behavior is a complex intermingling of nature and nurture. . . . Although most violence is perpetrated by young men against other young men, violent tendencies can develop prenatally or in early infancy or

The purpose of this Article is to propose a new standard for involuntary confinement that does not require a finding of mental illness but instead, based upon numerous actuarial assessments, focuses on determining an individual's likelihood of engaging in immediate and foreseeable acts of violence. This new statutory scheme would allow for the brief detention of potentially dangerous individuals and thereafter permit a further period of confinement if it is demonstrated that the offender poses a high likelihood of engaging in violent acts. Unlike most extant statutes, a showing of mental illness would not be required.

Ultimately, the proposed statute allows for the intervention and brief detainment of individuals at a much earlier time, for the purpose of preventing the types of horrific tragedies that have occurred in our country, from Charles Whitman,<sup>8</sup> to Columbine,<sup>9</sup> to Jonesboro, Arkansas,<sup>10</sup> to Red Lake, Minnesota,<sup>11</sup> and to workplace shootings that have occurred across the country<sup>12</sup>. This Article argues that an initial, and potentially extended, civil commitment can—and should—be warranted where, by clear and convincing evidence, an individual: (1) poses an immediate, foreseeable threat to others (the “dangerousness” component); (2) has engaged in at least one overt act of violence within the past thirty days; and (3) is engaged in behaviors that are, based upon empirical data and actuarial assessments, causally related to the commission of violent acts. If the brief intervention

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can emerge after the onset of puberty. Environmental factors often play a role. . . . Structural dysfunction may also contribute to violent behavior. Damage, the decreased metabolizing and uptake of glucose, reduced blood flow to the frontal lobes, and reduced function have all been observed in the frontal cortex of violent individuals and murderers. . . . [These injuries are] associated with an increased risk of aggressive and violent behavior.

*Id.* at 324–29.

<sup>8</sup> In 1966, Charles Whitman climbed into a tower at the University of Texas and shot forty-five people using a sniper rifle. See Gary M. Lavergne's *A Sniper in the Tower: The Charles Whitman Murders* (1997) for a full account.

<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> In 1998, two middle school students opened fire at a middle school killing five people. See John Kifner, *From Wild Talk and Friendship to Five Deaths in a Schoolyard*, N.Y. TIMES, March 29, 1998, available at <http://www.nytimes.com/1998/03/29/us/from-wild-talk-and-friendship-to-five-deaths-in-a-schoolyard.html>.

<sup>11</sup> In 2005, Jeffrey Weise shot and killed his grandfather and his grandfather's girlfriend and then drove to his high school where he shot and killed seven people. See Chris Maag, *The Devil in Red Lake*, TIME.COM, Mar. 27, 2005, <http://www.time.com/time/magazine/article/0,9171,1042470,00.html?promoid=googlep>.

<sup>12</sup> See *Workplace Shootings Fact Sheet*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/iif/oshwc/foi/osar0014.htm> (last visited Apr. 25, 2011).

reveals that an individual poses a grave threat of immediate and/or foreseeable violence to the community, then further confinement may be warranted as long as due process standards are carefully and specifically implemented.

We have the ability, in a manner that comports with due process, to stop a crime before it happens. Part II will discuss the Columbine and Virginia Tech massacres and how the involuntary commitment statutes in these states failed to protect the public from such dangerous individuals. Part II continues by discussing the constitutional due process standards enunciated by the U.S. Supreme Court governing involuntary confinement. Part III examines the current statutory schemes regarding involuntary civil confinement and concludes that these statutes fail to identify many individuals that are likely to engage in serious acts of violence. Part IV sets forth a two-tiered model statute that allows for the brief, and in some cases extended, detainment of individuals based upon the immediate and foreseeable likelihood that such individuals will engage in violence.

## II. THE MASSACRES AT COLUMBINE AND VIRGINIA TECH

Perhaps the most tragic aspect of the Columbine and Virginia Tech massacres was not only the failure of school officials to heed the early and imminent warning signs but also the courts' lack of statutory authority to involuntarily commit these individuals—for an initial brief period—to assess their level of dangerousness and potential for violence. The Colorado statute was insufficient to prevent the horrific Columbine tragedy.<sup>13</sup> Specifically, while the Columbine shooters certainly posed an imminent threat to others, there was no evidence that they suffered from a mental illness. In the Virginia Tech tragedy, while the shooter arguably satisfied the statutory standard, it was determined that outpatient treatment was the proper remedy.

### A. *Dylan Klebold and Eric Harris*

The tragedy at Columbine High School never would have happened if a statute existed in Colorado that allowed for the involuntary commitment of both Dylan Klebold (“Klebold”) and Eric Harris

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<sup>13</sup> See COLO. REV. STAT. ANN. § 27-65-111(1) (West 2011).

The court or jury shall determine that the respondent is in need of care and treatment only if the court or jury finds by clear and convincing evidence that the person has a mental illness and, as a result of the mental illness, is a danger to others or to himself or herself or is gravely disabled.

*Id.*

(“Harris”)—on a short-term basis—to assess their level of dangerousness and potential for violence. The overt acts and explicit threats made by these individuals established by clear and convincing evidence that, if left untreated, they would engage in a horrific act of violence in the immediate future. Klebold and Harris purchased firearms (including a rifle, semiautomatic pistol, and sawed-off shotguns) and stored them in their bedrooms in preparation for the ensuing attack at Columbine.<sup>14</sup> Furthermore, Klebold and Harris established a website whereby they specifically named students that they intended to kill with pipe bombs at the school.<sup>15</sup> They also “made videotapes of themselves shooting their guns and played them in school.”<sup>16</sup> Perhaps most disturbing is the fact that, in February of 1999, Klebold wrote a story for one of his classes detailing an assassin who “shoots down students and bombs the city.”<sup>17</sup> He further stated that the “man unload[ed] one of the pistols across the fronts of [the] four innocents . . . [t]he . . . streetlights caused a visible reflection off of the droplets of blood . . . *I understood his actions.*”<sup>18</sup> Klebold’s teacher described the account as “the most vicious story she’d ever read.”<sup>19</sup>

Unfortunately, the administrators at Columbine, along with investigators at the Jefferson County Sheriff’s Office, took minimal action to intervene and potentially prevent the horrifying tragedy. Amazingly, because police had previously investigated Harris’s home and found a pipe bomb, Columbine administrators “took no action because certainly they wouldn’t have wanted to interfere with an ongoing investigation.”<sup>20</sup> In addition, Columbine officials were alerted to the website where Klebold and Harris were threatening to kill several students, yet took no action in response.<sup>21</sup> Columbine’s adminis-

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<sup>14</sup> *Columbine: Were There Warning Signs?*, 60 MINUTES (CBS Television Broadcast April 17, 2001), <http://www.cbsnews.com/stories/2001/04/17/60II/main286163.shtml> [hereinafter 60 MINUTES].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> 60 MINUTES, *supra* note 14. A year before the massacre, those in charge of security at Columbine, Joe Schallmoser and Howard Cornell, “were worried that Columbine was just the kind of place where a school shooting might happen.” *Id.* Consequently, in August of 1998, eight months before the Columbine attack, they “wrote a security plan that required school officials to notify and meet with parents and law enforcement as soon as they learned of ‘a threat by any student’ to ‘commit any act of violence.’” *Id.* They said that “Columbine didn’t follow the plan.” *Id.*

<sup>21</sup> *Id.*; see Elise M. Balkin, Comment, *Rice v. Paladin: The Fourth Circuit’s Unnecessary Limiting of a Publisher’s Freedom of Speech*, 29 U. BALT. L. REV. 205, 205 (2000); Lynne

trators never talked to Klebold's or Harris's teachers, family, or friends, and after reading the story by Klebold in which he detailed the murders of four children they again did nothing.<sup>22</sup> On April 20, 1999, Klebold and Harris killed twelve students and one teacher and injured twenty-three others.<sup>23</sup>

### B. *Seung Hui Cho*

Likewise, the Virginia Tech massacre would never have happened had there been a statute permitting the involuntary confinement—for a brief period—of Seung Hui Cho (“Cho”) based upon the likelihood that he would engage in a violent act in the immediate or foreseeable future. Instead of focusing on the “dangerousness” component, the court focused primarily upon Cho’s mental state when making the confinement determination.<sup>24</sup> Beginning in his middle school years, Cho behaved in an isolated, withdrawn, inhibited, and non-communicative manner.<sup>25</sup> These behaviors continued through his high school years, as Cho’s “speech was barely audible and he did not respond in complete sentences[;] . . . he was not verbally inter-active at all and was shy and shut down.”<sup>26</sup> At the conclu-

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Marie Kohm, *The Rising Tide of Juvenile Violence: A Natural Disaster for Values-Free Culture, Education and Families?*, 1 BARRY L. REV. 109, 109 (2000); Robert D. Richards & Clay Calvert, *Columbine Fallout: The Long-Term Effects on Free Expression Take Hold in Public Schools*, 83 B.U. L. REV. 1089, 1089 (2003); David Kelly, *Columbine Warning Signs Overlooked, Evidence Shows / Young Killer Had 15 Run-ins with Law Before School Rampage*, L.A. TIMES, Feb. 24, 2007, available at [http://articles.sfgate.com/2004-02-27/news/17413812\\_1\\_sheriff-john-stone-sheriff-ted-mink-eric-harris](http://articles.sfgate.com/2004-02-27/news/17413812_1_sheriff-john-stone-sheriff-ted-mink-eric-harris); John Sarche, *Documentary Outlines Columbine Killers' Warning Signs*, BERKLEY DAILY PLANET, Mar. 30, 2002, available <http://www.berkeleydailyplanet.com/issue/2002-03-30/article/11066?headline=Documentary-outlines-Columbine-killers-warning-signs>; see also Sarah E. Redfield, *Threats Made, Threats Posed: School and Judicial Analysis in Need of Redirection*, 2003 BYU EDUC. & L.J. 663 (2003) (discussing the need for courts to establish a set of threat assessment factors in the school context); Richard Salgado, Comment, *Protecting Student Speech Rights While Increasing School Safety: School Jurisdiction and the Search for Warning Signs in a Post-Columbine/Red Lake Environment*, 2005 BYU L. REV. 1371 (2005) (discussing the line between student speech rights and educators' needs for secure school environment); Scott R. Simpson, Comment, *Report Card: Grading the Country's Response to Columbine*, 53 BUFF. L. REV. 415 (2005) (discussing federal and state legislation regarding school violence and recommending a grass roots approach to solve the problem).

<sup>22</sup> See 60 MINUTES, *supra* note 14.

<sup>23</sup> Regina Avila, Judi Acre & Jan Torpy, *Columbine Timeline*, DENV. POST, Apr. 16, 2000, <http://extras.denverpost.com/news/timeline.htm>.

<sup>24</sup> See VA. TECH REV. PANEL, MASS SHOOTINGS AT VIRGINIA TECH 47–48 (2007), available at <http://www.governor.virginia.gov/tempcontent/techPanelReport-docs/FullReport.pdf>.

<sup>25</sup> *Id.* at 1, 35.

<sup>26</sup> *Id.* at 36.

sion of his high school career, counselors determined that Cho suffered from depression and social anxiety disorder.<sup>27</sup>

It was at Virginia Tech, however, that Cho began to exhibit the early and imminent warning signs of dangerousness both to himself and others. To begin with, in the fall of 2005, Cho went to a dormitory party, unexpectedly brandished a knife, and proceeded to repeatedly stab the carpet.<sup>28</sup> He also produced a paper in one of his classes in which he criticized his classmates for consuming meat, stating, “[y]ou low-life barbarians make me sick to my stomach. I hope y’all burn in hell for mass murdering and eating all those little animals.”<sup>29</sup>

Cho’s dangerous behavior then began to escalate. He was found with a very large knife in his desk.<sup>30</sup> After further bizarre behaviors, which included sending strange emails to a female student, the Virginia Tech police intervened and took him into custody for an initial evaluation.<sup>31</sup> The pre-screener found that Cho suffered from a mental illness, was a danger to himself or others, and required in-patient hospitalization.<sup>32</sup> Critically, however, at a subsequent hearing where an independent psychologist evaluated Cho, the pre-screener’s findings were overruled.<sup>33</sup>

The attending psychiatrist instead found that “Cho ‘is mentally ill; that *he does not present an imminent danger to (himself/others)*, or is not substantially unable to care for himself, as a result of mental illness; and that he does not require involuntary hospitalization.’”<sup>34</sup> Ultimately, and in what represents the cornerstone of this Article, the Court found that, while “Cho ‘presents an imminent danger to himself as a result of mental illness,’” only outpatient treatment was required.<sup>35</sup> Cho was subsequently discharged.<sup>36</sup> The Court had the authority to detain Cho yet let him go. If Virginia had a statute requiring the in-patient detainment of Cho based upon the fact that he was an imminent danger to himself or others—regardless of mental illness—the Virginia Tech tragedy may never have happened.

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<sup>27</sup> *Id.* at 39.

<sup>28</sup> *Id.* at 42.

<sup>29</sup> *Id.*

<sup>30</sup> VA. TECH REV. PANEL., *supra* note 24, at 45.

<sup>31</sup> *Id.* at 47.

<sup>32</sup> *Id.* at 47.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (quoting the independent evaluator) (emphasis added).

<sup>35</sup> *Id.* at 48 (emphasis added).

<sup>36</sup> VA. TECH REV. PANEL., *supra* note 24, at 49.



Following this hearing, Cho continued his bizarre behavior, including writing very violent stories and remaining non-communicative in class.<sup>37</sup> One student remarked that Cho “was the kind of guy who might go on a rampage killing.”<sup>38</sup> Indeed, in the fall of 2007, Cho “began to purchase guns and ammunition.”<sup>39</sup> The “red flags” were so apparent that Cho should have been, but was not, subject to involuntary confinement. Multiple sources “expressed [concern] over Cho’s behavior in the dorm,” but this was not brought to the attention of the school’s Care Team.<sup>40</sup> Various faculty members “spoke up loudly about a sullen, foreboding male student who refused to talk, frightened classmates and faculty with macabre writings, and refused faculty exhortations to get counseling.”<sup>41</sup>

On April 16, 2007, Cho killed thirty-two students and injured approximately thirty others before killing himself,<sup>42</sup> confirming the psychiatrist’s determination that he presented an *imminent* threat to himself and others.<sup>43</sup>

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<sup>37</sup> *Id.* at 49.

<sup>38</sup> *Id.* at 51.

<sup>39</sup> *Id.* at 52.

<sup>40</sup> *Id.* “The Care Team at Virginia Tech was established as a means of identifying and working with students who have problems.” *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See Alison Pfeffer, “*Imminent Danger*” and *Inconsistency: The Need for National Reform of the “Imminent Danger” Standard for Involuntary Civil Commitment in the Wake of the Virginia Tech Tragedy*, 30 CARDOZO L. REV. 277, 277 (2008). Pfeffer criticizes the “imminent danger” standard, arguing as follows:

The real danger at hand is the effect of such a narrow threshold on involuntary civil commitment. While it may give individuals extensive rights, it sacrifices the needs of the mentally ill individuals who do not qualify and must suffer without treatment. Individuals who are too mentally ill to recognize that they are in need of treatment or refuse to consent to treatment cannot be involuntarily committed until their condition has become significantly worse and treatment may be less successful. In this sense, the ‘imminent danger’ standard is unbalanced because it preserves individual autonomy but severely undermines traditional theories of state power to care for and protect the mentally ill and society. . . . [Furthermore,] [a] lower threshold for involuntary civil commitment is associated with lower incarceration rates and higher commitment rates due to increased exercise of *parens patriae* power rather than police power.

*Id.* at 297–99.

<sup>43</sup> VA. TECH REV. PANEL, *supra* note 24, at 47; see also Katrina Chapman, *A Preventable Strategy at Virginia Tech: Why Confusion over FERPA’s Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349, 349 (2009).

C. *The Constitutional Requirements for Involuntary In-Patient Confinement*

This Article proposes a new standard governing the involuntary, in-patient civil confinement of dangerous individuals in such a way that: (1) comports with existing constitutional standards and (2) provides for the early detection and intervention of those individuals likely to engage in immediate and foreseeable acts of violence. Before reviewing the extant statutes governing involuntary confinement, it is necessary to examine the current constitutional framework within which such statutes must operate.

1. The Federal Level

In *O'Connor v. Donaldson*, the Supreme Court notes that involuntary civil commitment implicates important due process concerns.<sup>44</sup> Specifically, involuntary commitment “must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.”<sup>45</sup> Furthermore, a “finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will and keeping him . . . in simple custodial confinement.”<sup>46</sup> This is particularly true where such an individual “is capable of surviving safely in freedom by himself or with the help of family and friends.”<sup>47</sup> Moreover, in *Jackson v. Indiana*, the Court stated that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”<sup>48</sup> Involuntarily committed individuals retain a “liberty interest” and are thus entitled to safe condi-

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<sup>44</sup> *O'Connor v. Donaldson*, 422 U.S. 563, 574–75 (1975); *id.* at 580 (Burger, J., concurring).

<sup>45</sup> *Id.* at 580 (Burger, J., concurring); *see also* *Vitek v. Jones*, 445 U.S. 480, 491–93 (1980).

<sup>46</sup> *O'Connor*, 422 U.S. at 575. The *O'Connor* Court further held as follows:

The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. . . .

. . . That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. . . .

. . . One might as well as if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.

*Id.* at 574–75 (internal citations omitted).

<sup>47</sup> *Id.* at 576.

<sup>48</sup> 406 U.S. 715, 738 (1972).

tions of confinement, freedom from unreasonable bodily restraint, and, at a minimum, procedures designed to protect those interests.<sup>49</sup> Furthermore, in *Zinerman v. Birch*, the Court found that an individual must be “dangerous” to warrant involuntary confinement, holding that “the involuntary placement process serves to guard against the confinement of a person who, though mentally ill, is harmless.”<sup>50</sup> Additionally, an individual cannot be committed as a “voluntary” patient if he does not have the capacity to give informed consent.<sup>51</sup>

In *Addington v. Texas*, the Court held that, for purposes of involuntary confinement, the State must demonstrate by clear and convincing evidence that an individual has a mental illness that renders him a danger to himself or others.<sup>52</sup> The Court clarified this standard in *Kansas v. Hendricks*, stating that “[a] finding of dangerousness alone is ordinarily not a sufficient ground upon which to justify *indefinite* involuntary commitment.”<sup>53</sup> Critically, however, the Court noted that “[w]e have sustained civil commitment statutes when they have coupled proof of dangerousness *with the proof of some additional factor*, such as a ‘mental illness’ or ‘mental abnormality.’”<sup>54</sup> The *Hendricks* Court never required the States to incorporate mental illness within their involuntary commitment statutes. It only required the existence of some “additional factor,” which is precisely the focus of

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<sup>49</sup> *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 319 (1982). The *Youngberg* Court explained that “the right to personal security constitutes a ‘historic liberty interest’ protected substantively by the due process clause . . . [a]nd that right is not extinguished by lawful confinement, even for penal purposes.” *Id.* at 315.

<sup>50</sup> *Zinerman v. Birch*, 494 U.S. 113, 133–34 (1990). Specifically, the Court held that “[p]ersons who are mentally ill and incapable of giving informed consent to admission would not necessarily meet the standard for involuntary placement, which requires either that they are likely to injure themselves or others, or that their neglect or refusal to care for themselves threatens their well-being.” *Id.* at 133.

<sup>51</sup> *Id.*; cf. *Washington v. Silber*, 805 F. Supp. 379 (W.D. Va. 1992) (holding that an involuntarily committed patient could be forced to take antipsychotic drugs against his will, in light of the fact that the patient was substantially unable to care for himself, and there were no less restrictive alternative to involuntary confinement).

<sup>52</sup> *Addington v. Texas*, 441 U.S. 418, 419, 432–33 (1979).

<sup>53</sup> *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (emphasis added).

<sup>54</sup> *Id.* (emphasis added); see also Jennifer Honig & Susan Stefan, *New Law, Policy, and Medicine of Involuntary Treatment: A Comprehensive Case Problem Approach to Criminal and Civil Aspect Outpatient Commitment Debate*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 139, 139 (2005) (reiterating that proof of dangerousness must be accompanied by an *additional factor*, thus implying that mental illness is not a required component of involuntary commitment). *But see Foucha v. Louisiana*, 504 U.S. 71 (1992) (holding in a 5–4 ruling that an insanity acquittee, whose mental illness had been successfully treated, cannot be subject to continued confinement solely on the basis that he is a danger to the community).

the proposed statute. *Hendricks* and *Kansas v. Crane*<sup>55</sup> are notable because they upheld a statute in Kansas that authorized the involuntary commitment of sexual offenders *after* completion of their sentence, provided that such individuals were found to be suffering from: (1) a mental abnormality or defect and (2) lacked volitional control.<sup>56</sup>

Federal district courts, however, have eviscerated the “dangerousness” component of involuntary commitment by holding that an individual need not engage in an overt act of violence to be involuntarily committed. For example, in *Covell v. Smith*, the District Court for the Eastern District of Pennsylvania held that “[a] finding of ‘dangerousness’ does not require an overt act by the individual.”<sup>57</sup> Likewise, in *Burrue v. Spurgeon*, in rejecting petitioner’s habeas claim, the court held that “there is no clearly established Supreme Court law requiring proof of a ‘recent overt act’ to support a civil commitment.”<sup>58</sup>

## 2. The State Court Level

Decisions at the state court level have also impacted the nature and scope governing involuntary confinement. For example, in *In re Commitment of Dennis H.*, the Wisconsin Supreme Court rejected the claim that, for purposes of involuntary commitment, an individual must present an *imminent* threat of physical harm.<sup>59</sup> Instead, the court

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<sup>55</sup> 521 U.S. 346 (1997) (making the ruling dependent upon its determination that the statute was non-punitive in nature); see also David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 710–11 (2009) (discussing general principles governing in-patient confinement).

<sup>56</sup> *Crane*, 521 U.S. at 356–57; see also *In re Commitment of W.Z.*, 173 N.J. 109 (2002) (upholding a virtually identical statute in New Jersey).

<sup>57</sup> No. 95-501, 1996 WL 750033, at \*4 (E.D. Pa. Dec. 30, 1996) (emphasis added).

<sup>58</sup> No. ED CV O7-1131-AG(E), 2008 WL 624752, at \*6, \*8 (C.D. Cal. Mar. 5, 2008) (noting that the Supreme Court has “not specifically defined the dangerousness element of the . . . substantive due process standard.”) (citation omitted).

<sup>59</sup> *In re Commitment of Dennis H.*, 647 N.W.2d 851, 862 (Wis. 2002). In so holding, the Court stated as follows:

It is well-established that the state “cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” This does not mean, however, that substantive due process requires the state to restrict the scope of its mental health commitment statutes to only those individuals who are imminently physically dangerous. There is no “single definition that must be used as the mental condition sufficient for involuntary mental commitments.” In this complicated and difficult area, the Supreme Court “has wisely left the job of creating statutory definitions to the legislators who draft state laws.

*Id.* at 862–63 (citations omitted).

held that “substantive due process has not been held to require proof of imminent physical dangerousness to self or others as a necessary prerequisite to involuntary commitment.”<sup>60</sup> In so holding, the court found constitutional a section of Wisconsin’s involuntary commitment statute that required only a “substantial probability” that an individual may engage in acts of violence due to loss of volitional control.<sup>61</sup> Similarly, in *In re Albright*,<sup>62</sup> the Kansas Court of Appeals held that a finding of “imminency” was not required to justify involuntary confinement, holding that such commitment “merely ‘requires a showing that the *potential for doing harm* is great enough to justify such a massive curtailment of liberty.’”<sup>63</sup> In accepting this lower threshold determination for violence, the court referred to other decisional law, where the imminency standard was replaced by “a serious threat to himself or others,”<sup>64</sup> a “likelihood of inflicting serious harm on himself or on others,”<sup>65</sup> or “a serious threat of *substantial harm* to themselves or others.”<sup>66</sup>

Furthermore, in *In re A.S.B.*, the Montana Supreme Court issued a monumental decision, holding that involuntary commitment was justified where the plaintiff’s mental illness, if untreated, may deteriorate to such a point where he becomes a threat to public safety.<sup>67</sup> Thus, based upon relevant decisional law, if there is an individual suffering from a mental illness that poses a “potential” for violence—yet has not exhibited any actions manifesting violent behavior—then he or she could be subject to civil confinement.<sup>68</sup>

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<sup>60</sup> *Id.* at 862.

<sup>61</sup> *Id.* at 859.

<sup>62</sup> *In re Albright*, 836 P.2d 1 (Kan. Ct. App. 1992).

<sup>63</sup> *Id.* at 4 (quoting *In re Harris*, 654 P.2d 109 (Wash. 1982)) (emphasis added).

<sup>64</sup> *Id.* (quoting *Stamus v. Leonhardt*, 414 F.Supp. 439, 451 (S.D. Iowa 1976)).

<sup>65</sup> *Id.* (quoting *Lynch v. Baxley*, 386 F.Supp. 378, 391 (M.D. Ala. 1974)).

<sup>66</sup> *Id.* (quoting *Doremus v. Farrell*, 407 F.Supp. 509, 515 (D. Neb. 1975) (emphasis added)). *But see* *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980) (quoting *Lesard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F.Supp. 1318 (E.D. Wis. 1976)) (“the proper standard [for involuntary commitment] is that which requires a finding of imminent and substantial danger as evidenced by a recent overt act, attempt or threat.”).

<sup>67</sup> *See In re Mental Health of A.S.B.*, 180 P.3d 625, 630 (Mont. 2008).

<sup>68</sup> *See, e.g.*, *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D. Neb. 1975); *Hatcher v. Wachtel*, 269 S.E.2d 849 (W.Va. 1980); *In re Harris*, 654 P.2d 109 (Wash. 1982); *Stamus v. Leonhardt*, 414 F.Supp. 439 (S.D. Iowa 1976). *But see* *Reome v. Levine*, 692 F. Supp. 1046 (D. Minn. 1988) (holding that confinement of an individual based upon dangerousness alone was insufficient where the patient was not mentally ill).

III. THE LEGISLATIVE STANDARDS GOVERNING INVOLUNTARY  
COMMITMENT AND THEIR FAILURE TO IDENTIFY  
THE MOST DANGEROUS INDIVIDUALS

In light of relevant decisional law, every state has drafted its own statutes governing involuntary commitment. The problem is that nearly every state statute includes factors that: (1) are not constitutionally required by relevant Supreme Court jurisprudence and (2) fail to identify the most dangerous individuals because of the “mental illness” requirement. Although the states have correctly included the “dangerousness” element in their statutes, they have incorrectly required the presence of a mental illness, which is, based upon empirical data, not in and of itself a causal factor in violence.

These statutes assume that dangerous individuals must suffer from a mental disorder and that is simply incorrect. To make matters worse, the relevant statutes do not require, as discussed in Part IV, the showing of the most relevant early and imminent warning signs of violence that should accompany the “dangerousness” calculus. As a result, a dangerous but not-mentally ill individual can, in nearly every state, engage in acts of horrific violence because he or she is not eligible for involuntary commitment. We must wait *until the crime happens*, rather than *prevent it* through early intervention. A sample of current statutes is demonstrative of this approach.

A. *Relevant State Statutes Governing Involuntary Confinement:  
The Wrong Emphasis on Mental Illness*

This section will (1) begin by surveying several statutes that are representative of and consistent with those in all states, in that they require a showing of mental illness for purposes of in-patient treatment, and (2) proceed to demonstrate that mental illness, in and of itself, is not a causal factor in violent behavior.

1. Alabama

Alabama Code section 22-52-10.4 provides in relevant part as follows:

- (a) A respondent may be committed to in-patient treatment if the probate court finds, based upon clear and convincing evidence that: (i) the respondent is mentally ill; (ii) as a result of the mental illness the respondent poses a real and present threat of substantial harm to self and/or others; (iii) the respondent will, if not treated, continue to suffer mental distress and will continue to experience deterioration of the ability to function independently; and (iv) the respondent is unable to make a rational and

informed decision as to whether or not treatment for mental illness would be desirable.<sup>69</sup>

## 2. Arkansas

Arkansas Code Annotated section 20-47-207(c) provides in relevant part as follows: “A person shall be eligible for involuntary admission if he or she is in such mental condition as a result of mental illness, disease, or disorder that he or she poses a clear and present danger to himself or herself or others.”<sup>70</sup>

## 3. Connecticut

Connecticut General Statute section 17a-498(c) provides as follows:

If, on such hearing, the court finds by clear and convincing evidence that the person complained of has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, it shall make an order for his or her commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he or she is discharged or converted to voluntary status pursuant to section 17a-506 in due course of law.<sup>71</sup>

## 4. Florida

Florida Statute Annotated section 394.467(1) provides in relevant part as follows:

A person may be placed in involuntary inpatient placement for treatment upon a finding of the court by clear and convincing evidence that:

- (a) He or she is mentally ill and because of his or her mental illness:
  1. (a) He or she has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment; or
  - (b) He or she is unable to determine for himself or herself whether placement is necessary; and
2. (a) He or she is manifestly incapable of surviving alone or with the help of willing and responsible

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<sup>69</sup> ALA. CODE § 22-52-10.4(a) (LexisNexis 2011).

<sup>70</sup> ARK. CODE ANN. § 20-47-207(c) (West 2011).

<sup>71</sup> CONN. GEN. STAT. ANN. § 17a-498(c) (West 2011).

family or friends . . . and, without treatment, is likely to suffer from neglect or refuse to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; or

(b) There is substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm.<sup>72</sup>

### 5. Illinois

Finally, Illinois Compiled Statute chapter 405, section 5/1-119 provides as follows:

Persons subject to involuntary admission . . . means:

- (1) A person with mental illness who because of his or her illness is reasonably expected . . . to engage in conduct placing such person or another in physical harm or in reasonable expectation of being physically harmed;
- (2) A person with mental illness and who because of his or her illness is unable to provide for his basic physical needs so as to guard himself or herself from serious harm without the assistance of family or others . . . ; or
- (3) A person with mental illness who: (i) refuses treatment or is not adhering adequately to prescribed treatment; (ii) because of the nature of his or her illness, is unable to understand his or her need for treatment; and (iii) if not treated on an inpatient basis, is reasonably expected, based on his or her behavioral history, to suffer mental or emotional deterioration and is reasonably expected, after such deterioration, to meet the criteria of either paragraph (1) or paragraph (2) of this Section.<sup>73</sup>

Each of the above statutes are consistent with and representative of enactments across the country,<sup>74</sup> which nearly all require the exis-

<sup>72</sup> FLA. STAT. ANN. § 394.467(1) (West 2011).

<sup>73</sup> 405 ILL. COMP. STAT. 5/1-119 (West 2011).

<sup>74</sup> See, e.g., ALASKA STAT. ANN. § 47.30.755(a) (West 2011); ARIZ. REV. STAT. ANN. § 36-540(A) (2011); CAL. WELF. & INST. CODE § 5250 (West 2011); COLO. REV. STAT. ANN. § 27-10-102(5) (West 2011); DEL. CODE ANN. tit. 16, § 5010 (2011); D.C. CODE § 21-545(b) (2011); GA. CODE ANN. § 37-3-1(9.1) (2011); HAW. REV. STAT. § 334-60.2 (West 2011); IDAHO CODE ANN. § 66-329(11) (2011); IND. CODE ANN. §12-26-7-5(a) (West 2011); IOWA CODE ANN. § 229.1(16) (West 2011); KAN. STAT. ANN. § 59-2946(f) (West 2010); KY. REV. STAT. ANN. § 202A.026 (West 2010); LA. REV. STAT. ANN. § 28:55(E) (1) (2011); ME. REV. STAT. ANN. tit. 34-B, § 3864(6)(a) (2010); MD. CODE. ANN., HEALTH-



tence of a mental illness as a prerequisite to involuntary confinement.<sup>75</sup> As one commentator noted, “courts tend to regard the severity and type of symptoms of an individual’s mental illness, including self-destructive behavior, as indicative of whether involuntary commitment is warranted.”<sup>76</sup> As described below, however, mental illness alone does not bear a significant causal relationship to dangerous behavior.<sup>77</sup> Thus, those individuals who are extremely—and imminently—dangerous (but not mentally ill) are not subject to confinement and remain a grave threat to the community.

*B. Mental Illness and Violence: The Lack of a Significant Causal Link*

The fatal infirmity in most states’ statutory schemes is that they require a showing of mental illness before an individual is eligible for involuntary confinement. This requirement undermines the very purpose of involuntary commitment statutes because it allows dangerous but non-mentally ill individuals to remain free of early detection and intervention efforts. This is exacerbated by the lack of a causal relationship between mental illness and violent behavior.

As one commentator has explained, “[m]ost violence is not committed by persons with mental illness; [for example,] studies sug-

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GEN. §10-632(e)(2) (LexisNexis 2011); MASS. GEN. LAWS ANN. ch. 123, § (8) (a) (West 2011); MICH. COMP. LAWS ANN. § 330.1401 (West 2011); MINN. STAT. ANN. § 253B.09(1) (West 2011); MISS. CODE ANN. § 41-21-73(4) (2011); MO. ANN. STAT. § 632.350(5) (West 2011); MONT. CODE ANN. § 53-21-126(1) (2009); NEB. REV. STAT. ANN. § 71-925(1) (LexisNexis 2010); NEV. REV. STAT. § 433A.310(1) (LexisNexis 2011); N.H. REV. STAT. ANN. § 135-C:34 (2011); N.J. STAT. ANN. § 30:4-27.2(m) (West 2011); N.M. STAT. ANN. §43-1-11(c) (West 2010); N.Y. MENTAL HYG. LAW §§ 9.05(b), 9.37(a) (McKinney 2011); N.C. GEN. STAT. § 122C-268(j) (2011); N.D. CENT. CODE § 25-03.1-07 (2011); OHIO REV. CODE ANN. § 5122.15(C) (LexisNexis 2011); OKLA. STAT. ANN. tit. 43A § 1-103(13)(a) (West 2011); OR. REV. STAT. § 426.005(1)(d) (West 2011); 50 PA. CONS. STAT. ANN. § 7301 (West 2010); R.I. GEN. LAWS § 40.1-5-8(j) (2010); S.C. CODE ANN. § 44-17-580 (2010); S.D. CODIFIED LAWS § 27A-1-2 (2010); TENN. CODE ANN. § 33-6-501 (2010); TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2009); UTAH CODE ANN. § 62A-15-631(10) (LexisNexis 2010); VT. STAT. ANN. tit. 18, § 7101(17) (2011); VA. CODE ANN. § 37.2-817.C (2011); WASH. REV. CODE ANN. § 71.05.240 (West 2011); W. VA. CODE § 27-5-4(j) (LexisNexis 2010); WIS. STAT. ANN. §§ 51.20(1)(a)(1), 51.20(1)(a)(2) (West 2011); WYO. STAT. ANN. §25-10-110(j) (2010); *see also* TREATMENT ADVOCACY CENTER, <http://www.treatmentadvocacycenter.org> (last visited Mar. 29, 2011).

<sup>75</sup> See Elizabeth A. McGuan, *New Standards for the Involuntary Confinement of the Mentally Ill: Danger Redefined*, 11 MARQ. ELDER’S ADVISOR 181, 200–06 (2009) (discussing the definition of “dangerousness” and how it has been defined differently among the states, from the threat of “imminent harm” or “substantial likelihood” of engaging in violent behavior).

<sup>76</sup> Pfeffer, *supra* note 42, at 295.

<sup>77</sup> See *supra* Part II.

gest that individuals with schizophrenia account for only 5% of the violence that occurs society wide.”<sup>78</sup> Accordingly, “[a]ttempts that aim to prevent events like those that took place at Columbine and Virginia Tech by focusing on detection and intervention among persons with severe mental illness will not make society much safer.”<sup>79</sup> Indeed, one study found that “[a]pproximately 90 percent of people with mental disorders are in no way violent or dangerous.”<sup>80</sup> Another report that observed patients with mental disorders one year after discharge from hospitalization concluded that “no significant difference [exists] between the prevalence of violence by patients without symptoms of substance abuse and the prevalence of violence by others living in the same neighborhoods who were also without symptoms of substance abuse.”<sup>81</sup> Rather, “[t]he mentally ill may in fact be more likely to withdraw or harm themselves than to act aggressively toward others.”<sup>82</sup> Thus, mental illness does not bear a causal relationship to violent behavior unless it is accompanied by a diagnosis of substance abuse.<sup>83</sup>

These findings were underscored by a study at the University of Oxford, which found that mental illness is only predictive of violence when there exists a co-occurring disorder such as drug or alcohol abuse.<sup>84</sup> With respect to bi-polar disorder and schizophrenia, the report stated that

the overrepresentation of individuals with bi-polar disorder in violent crime statistics is almost entirely attributable to concurrent drug or alcohol abuse. . . . “In people without substance abuse problems, bi-polar disorder is not a problem for violent crime. . . . This shows we need to focus our attention on how we can detect those individuals with bipolar disorder and schizophrenia *with*

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<sup>78</sup> Mossman, *supra* note 1, at 136.

<sup>79</sup> *Id.*; see also Caroline M. Mee & Harold V. Hall, *Risky Business: Assessing Dangerousness in Hawai'i*, 24 U. HAW. L. REV. 63, 108–12 (2001) (discussing the various factors that contribute to violent behavior).

<sup>80</sup> Loo, *supra* note 4 (citing Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiological Catchment Area Surveys*, 41 HOSPITAL & COMMUNITY PSYCHIATRY 761 (1990)).

<sup>81</sup> Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GENERAL PSYCHIATRY 393, 393 (1998).

<sup>82</sup> Loo, *supra* note 4 (citing Marc Hillbrand et al., *Clinical Predictors of Self-Mutilation in Hospitalized Patients*, 182 J. NERVOUS & MENTAL DISEASE 9 (1994)).

<sup>83</sup> See Steadman, *supra* note 81, at 393.

<sup>84</sup> See *Drugs and Alcohol, Not Mental Illness, Explains Violent Behavior*, UNIVERSITY OF OXFORD (Sept. 07, 2010), [http://www.ox.ac.uk/media/news\\_stories/2010/100907.html](http://www.ox.ac.uk/media/news_stories/2010/100907.html).

*substance abuse problems*, and prevent and treat those who are abusing substances.”<sup>85</sup>

Mental illness alone does not bear a causal relationship to the commission of violent acts. As one psychologist explains:

It’s time that . . . we begin to knock down stereotypes and start breaking down the stigma associated with mental disorders. The first stereotype to go down—permanently, we hope—is that people who suffer from depression, anxiety, schizophrenia, an eating disorder, or any other type of mental disorder, are somehow more violent than others. This simply isn’t true, unless they are involved in substance abuse. Use and abuse of substances such as drugs or alcohol is often correlated with an increase in violence anyway . . . . Violence is most often a criminal activity which has little correlation with a person’s mental health. Most people who suffer from a mental disorder are not violent—there is no need to fear them.<sup>86</sup>

Thus, “people with a mental illness . . . are no more likely than anyone else to harm strangers.”<sup>87</sup>

These findings are congruous with numerous empirical studies, including a comprehensive study titled “Mental Illness and Violence: Proof or Stereotype,” which confirms that mental illness does not bear a causal relationship to violent conduct.<sup>88</sup> In this study, researchers found that “there is no consistent evidence to support the hypothesis that mental illness . . . that is uncomplicated by substance abuse[,] is a significant risk factor for violence or criminality, once past history of violence is controlled.”<sup>89</sup> The study also found that “[i]t is unlikely that a member of the public would be at risk of violence from someone with a non-substance abuse disorder.”<sup>90</sup> Additionally, “[p]ersons with mental illnesses are no more likely to be charged with a violent crime than those who do not have a mental illness.”<sup>91</sup> Consequently, based upon the data considered in the study,

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<sup>85</sup> *Id.* (emphasis added) (quoting Dr. Seena Fazel of the Department of Psychiatry at the University of Oxford).

<sup>86</sup> Grohol, *supra* note 4.

<sup>87</sup> *Violence and Mental Illness*, CAN. MENTAL HEALTH ASS’N, [http://cmha.ca/bins/content\\_page.asp?cid=3-108](http://cmha.ca/bins/content_page.asp?cid=3-108) (last visited March 13, 2011).

<sup>88</sup> ARBOLEDA-FLÓREZ ET AL., *supra* note 4.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

the researchers concluded “there is *no compelling scientific evidence* to suggest that mental illness causes violence.”<sup>92</sup>

Rather, individuals suffering from mental disorders are more likely to be the victims, rather than perpetrators, of violent crime. For example, existing research “shows that people with major mental illnesses are 2.5 times more likely to be the victims of violence rather than other members of society.”<sup>93</sup> Another study found that “persons with severe mental illness are victims of violent crime in the course of a year . . . [a]t a rate 11 times higher than that of the general population.”<sup>94</sup> Specifically, “[p]eople with mental illnesses were eight times more likely to be robbed, 15 times more likely to be assaulted, and 23 times more likely to be raped than was the general population.”<sup>95</sup> As one commentator explains, “[t]he direction of causality is the reverse of common belief: persons who are seriously mentally ill are far more likely to be the victims of violence than its initiators.”<sup>96</sup> The reasons supporting this conclusion are attributable, in part, to “minimal family or community support, low socioeconomic status, social stress, social isolation, poor self-esteem and personality problems.”<sup>97</sup>

Ultimately, the extant statutes governing involuntary confinement make it more, rather than less, difficult to identify those individuals that are most likely to engage in violent conduct. Indeed, individuals who pose the greatest risk for violence are not mentally ill; instead, they are, among other things, substance abusers. Thus, by requiring a showing that a person suffers from a cognizable mental illness as a prerequisite to involuntary confinement, we are not only narrowing the class of individuals subject to confinement, but we are also incorrectly identifying those most at risk for engaging in acts of violence. This is particularly troubling because involuntary commitment statutes are not only designed to treat people with mental illnesses, but they are intended to protect the community from those

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<sup>92</sup> *Id.*; see also Kristina M. Campbell, *Blurring the Lines of the Danger Zone: The Impact of Kendra's Law on the Rights of the Nonviolent Mentally Ill*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 176 (2002) (stating that, in New York, involuntary outpatient commitment laws do not require a showing of dangerousness); Jessica L. MacKeigan, *Violence, Fear and Jason's Law: The Needless Expansion of Social Control over the Non-Dangerous Mentally Ill in Ohio*, 56 CLEV. ST. L. REV. 739, 749 (2008) (discussing a proposed law in Ohio that would allow for the forced outpatient treatment of mentally ill individuals without any significant finding of dangerousness).

<sup>93</sup> *Violence and Mental Illness*, *supra* note 87.

<sup>94</sup> Aaron Levin, *People with Mental Illness are More Often Crime Victims*, PSYCHIATRIC NEWS (Sept. 2, 2005), <http://pn.psychiatryonline.org/content/40/17/16.full>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Violence and Mental Illness*, *supra* note 87.

most at risk for engaging in violent behavior. The current statutes do just the opposite—they exclude from confinement the vast majority of individuals who, based upon a number of factors not remotely related to mental illness, are likely to engage in violent criminal conduct.

Furthermore, the Supreme Court has never required that a person be mentally ill before involuntary commitment is warranted. Instead, in *Kansas v. Crane*, the Court said that a finding of dangerousness must be accompanied by an “additional” factor or factors,<sup>98</sup> and those “additional” factors, this Article submits, should be variables most likely to predict, based upon actuarial assessments and other data, whether a particular individual is highly likely to engage in criminal conduct. The involuntary commitment statutes have it backwards—they over-emphasize mental illness and under-emphasize dangerousness. It should be the reverse, which is precisely what the proposed statute in this Article endeavors to accomplish. Stated simply, involuntary commitment statutes should be revised to focus upon the “dangerousness” component, and such statutes should enunciate multi-factorial elements related to the dangerousness component that must be satisfied, such as an overt act of violence, in order to warrant confinement. Of course, under such a revised statute, individuals who suffer from mental illnesses will still be subject to confinement if they are dangerous, but the requisite causal relationship between mental illness and violence will not be required. In essence, the statute will broaden the scope of those subject to confinement, thus promoting greater treatment and public safety.

#### IV. THE PROPOSED STATUTE GOVERNING INVOLUNTARY COMMITMENT: FOCUSING ON IMMEDIATE AND FORESEEABLE DANGEROUSNESS

The proposed statute strives to reverse, for purposes of involuntary commitment, the emphasis from those who are mentally ill to those who pose an immediate, significant, and foreseeable threat to the community. In this way, the proposed statute will broaden the class of individuals who may be subject to involuntary confinement by including dangerous but non-mentally ill individuals. Importantly, however, the statute is not punitive. Instead, it is designed, should involuntary confinement be deemed necessary, to provide effective treatment for an individual (rehabilitation), while also seeking to promote greater public safety (utilitarianism). In so doing, both the

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<sup>98</sup> 521 U.S. 346, 358 (1997).

substantive and procedural due process rights of the patient will be strictly protected, and the confinement will be conducted in a safe manner that seeks to ensure effective treatment in the shortest possible timeframe.

A. *The Proposed Statute, the Early Intervention and Prevention Act (EIPA): Procedures Governing the Confinement of Individuals Likely to Engage in Immediate and/or Foreseeable Acts of Violence*

1. EIPA Statement of Purpose

The purpose of the proposed statute, the Early Intervention and Prevention Act (EIPA), is to identify those individuals who pose a grave threat to engage in violent conduct towards themselves or others in the immediate or foreseeable future. Importantly, this statute does not require a finding of “mental illness” as a prerequisite to involuntary confinement because empirical data has demonstrated that mental illness, in and of itself, is not a substantial causal factor in violent behavior.

The statute is neither punitive nor retributive in nature; rather it seeks to provide effective treatment for those individuals whose circumstances and prior experiences render them likely to engage in violent acts in the immediate and foreseeable future. More specifically, the statutory language and procedures adopted therewith are intended to comply with an individual’s liberty interests and procedural and substantive due process safeguards. For example, as set forth below, any individual committed under this statute shall have the right to a safe environment in which an individualized treatment plan is adopted to address the individual’s particular needs and characteristics. Such treatment shall be conducted in a manner that is designed to ensure a successful outcome in the shortest time possible and through the least restrictive means available.

Additionally, the court within the respective jurisdiction where involuntary confinement is conducted shall serve to oversee and ensure that the administration and implementation of any treatment is conducted in a manner that relates to the specific purposes justifying the initial confinement. The court shall have other oversight duties, including: determining why continued confinement and treatment is necessary; whether treatment is being properly administered consistent with the States’ initial treatment framework; setting forth particular intervals within which the State must report to the court regarding the efficacy of the treatment; and ultimately placing a time-limit upon which the individual may be confined, regardless of whether treatment is successful. The burden shall be on the State to justify in-

ital and continued confinement, and the defendant will have, at all times, the ability to contest this justification and seek immediate release.

The EIPA has the primary purpose of increasing public safety by treating those individuals who represent the greatest threat of engaging in violent behavior. This statute also assumes that individuals who are prone to immediate and foreseeable violence can successfully be treated in a manner that substantially reduces, if not eliminates, this proclivity, and thus improves the individual's quality of life and reduces crime in the particular community where such individual resides.

## 2. EIPA Definitions

As set forth in the statutory language, the following definitions shall apply:

"Immediate threat of harm" refers to the level of danger posed by the particular individual for whom the State seeks confinement. "Immediate" does not necessarily mean "imminent," in that the harm sought to be prevented is predicted to occur in a matter of hours or specified period of time. This interpretation would be impractical and unworkable because it is simply unpredictable. The term "immediate" shall instead be construed to mean that the threat is reasonably likely to occur in the near, rather than distant, future, to such an extent that those individuals—such as family, friends, co-workers and others associated with the individual—believe that there is a high likelihood that the individual will, in a matter of days, even weeks, engage in an act of violence against either himself or herself or others. There is no specific formula or criteria to determine whether the likelihood for violence is "immediate," although it does require that its potential be real, substantial, and likely to occur within a short time period.

"Foreseeable threat of harm" shall be construed to mean that, based upon an individual's recent behavior, overt acts, and interactions with others, it is reasonably likely that an act of violence will be a reasonably likely consequence of, or bear a causal relationship to, that individual's recent behavior, overt acts, and interactions with others. The term "foreseeable" does not—and should not—be construed as a qualification on the term "immediate." Rather, it must be reasonably foreseeable, in the immediate future, that the individual's potential for violence is likely to result from his or her preceding actions.

“Overt Act of Violence” shall be construed to mean that an individual has engaged in an act of violence to himself or herself, towards others, or to property. The overt act shall not be limited to acts of physical violence but shall include verbal threats, acts of intimidation, and other behaviors that are intended to place, or result in placing, others in fear of bodily harm.

“Direct or Substantial Cause of Violent Behavior” shall be construed to mean that an individual is engaged in behaviors that predict or indicate that such individual is reasonably likely to engage in an act or acts of violence in the immediate or foreseeable future. The determination of whether an individual engages in behaviors causally related to violent behavior depends upon the administration of actuarial assessments, such as the Historical Clinical Risk-20 (HCR-20), Hare Psychopathy Checklist Revised (PCL-R), Level of Service Inventory, and Violence Risk Appraisal Guide (VRAG), which contain numerous factors, based upon prior research, that accurately predict whether a person is reasonably likely to engage in violent behavior.<sup>99</sup> These and other tools shall be used in determining whether an individual poses an immediate and/or foreseeable threat of harm to himself or herself or others.<sup>100</sup>

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<sup>99</sup> See, e.g., David P. Farrington, *Predictors, Causes and Correlates of Male Youth Violence*, 24 CRIME & JUST. 421, 432–42 (1998) (listing and examining factors that cause violence in young males); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators and Patients*, 92 VA. L. REV. 391, 409–26 (2006) (discussing the various factors that lead to violent behavior); Brian Netter, *Using Group Statistics to Sentence Individual Criminals: An Ethical and Statistical Critique of the Virginia Risk Assessment Program*, 97 J. CRIM. L. & CRIMINOLOGY 699, 705–13 (2007) (assessing the factors Virginia uses in its risk-assessment program, including, but not limited to, age, marital status, employment status, prior criminal record, whether the offender acted alone when committing a particular crime, and whether the offender was incarcerated as a juvenile).

<sup>100</sup> For example, Historical, Clinical, Risk Management–20 (HCR–20) uses the following twenty factors in assessing the potential for violent behavior: (1) previous violence; (2) young age at first violent incident; (3) relationship instability; (4) employment problems; (5) substance abuse problems; (6) major mental illness; (7) psychopathy; (8) early maladjustment; (9) personality disorder; (10) prior supervision failure; (11) lack of insight; (12) negative attitudes; (13) active symptoms of major mental illness; (14) impulsivity; (15) unresponsive to treatment; (16) plans lack feasibility; (17) exposure to destabilizers; (18) lack of personal support; (19) non-compliance with remediation attempts; and (20) stress. *Historical, Clinical, Risk Management–20 (HCR–20)*, ENCYCLOPEDIA OF MEDICAL DISORDERS, <http://www.minddisorders.com/Flu-Inv/Historical-Clinical-Risk-Management-20.html> (last visited May 23, 2011). See also MONAHAN ET AL., *RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE* (2001); GEORGES-FRANCK PINARD, LINDA PAGANI, *CLINICAL ASSESSMENT OF DANGEROUSNESS: EMPIRICAL CONTRIBUTIONS* (2001).



“Early and Imminent Signs of Violent Behavior” refers to behaviors identified through empirical studies indicating whether an individual is reasonably likely to engage in violent conduct. “Early warning signs” are often used as a method by which to justify an initial intervention, but for purposes of this statute, they shall not be sufficient to form the basis for involuntary confinement. Rather, there must also be both: (1) direct and/or substantial causes of violent behavior and (2) behaviors/overt acts that suggest the commission of violence in the immediate future. With respect to the “early and immediate signs of violent behavior,” the following non-exhaustive list of factors shall be considered:

Early Warning Signs:

- Social withdrawal
- Excessive feelings of isolation and being alone
- Excessive feelings of rejection
- Being a victim of violence
- Feelings of being persecuted
- Uncontrolled anger
- Patterns of impulsive behavior
- Drug and alcohol use
- Access to or possession of firearms
- Threats of violence
- Physical fighting with peers or family members
- Destruction of property
- Self-injurious behavior, including suicidal ideation
- Anti-social behavior
- Head trauma
- Prior criminal record<sup>101</sup>

Immediate Warning Signs:

- Severe rage episodes
- Repeated acts of aggression
- Detailed threats of lethal violence

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<sup>101</sup> U.S. DEP'T OF EDUC. EARLY WARNING, TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS (2005), <http://www2.ed.gov/about/offices/list/osep/gtss.html> (listing these and other factors); *see also* ASS'N OF THREAT ASSESSMENT PROF'LS, RISK ASSESSMENT GUIDELINE ELEMENTS FOR VIOLENCE: CONSIDERATIONS FOR ASSESSING THE RISK OF FUTURE VIOLENT BEHAVIOR (2006), *available at* <http://downloads.workplaceviolencenews.com/rage-v.pdf> (listing these factors).

- Possession of a detailed plan outlining when and where violence is planned to occur

### 3. EIPA § 1.1: Initial Confinement and Examination

Whoever, presents an immediate and/or foreseeable threat of harm to himself or herself or others; has engaged in at least one overt act of violence within the past thirty (30) days; presents at least two factors known to be a direct or substantial cause of violent behavior; and presents other factors known to be early and immediate signs of violent behavior shall be confined, upon judicial determination, for a period of at least forty-eight (48) hours but not more than seventy-two (72) hours. During this initial-confinement period, the appropriate professionals shall examine such individual and, using actuarial instruments, such as the HCR-20, PCL-R Revised, and Level of Service Inventory, such professional shall issue a recommendation stating whether involuntary confinement beyond the above-prescribed period is necessary. Subsequent to this recommendation, the individual shall be entitled to release until such time as a hearing is held before a Court of Law, in which the State must demonstrate, by clear and convincing evidence, that continued confinement is warranted. The hearing shall occur no later than seventy-two (72) hours after the initial recommendation by the relevant professional examiners.

### 4. EIPA § 1.2: The Hearing to Determine Whether Continued Confinement is Warranted

At such hearing concerning whether an individual should be subject to confinement beyond the period prescribed in § 1.1, the State has the initial burden of producing specific evidence demonstrating, by clear and convincing evidence, that the individual possesses an immediate and/or foreseeable threat to harm himself or herself or others. The State's evidence shall include, but will not necessarily be limited to, expert testimony explaining why, on the basis of prior actuarial assessments (e.g., the HCR-20), continued confinement is warranted. More specifically, the State shall set forth, based upon actuarial instruments, the particular factors that render the individual an immediate and/or foreseeable threat to himself or herself or others. The State shall then have the additional burden of articulating a specific and individualized treatment plan (i.e., behavioral therapy and/or a medication regimen that is related to the purposes justifying the individual's continued confinement). The State shall also specify the time period within which such treatment

plan is likely to be successful and endeavor to select the shortest time period possible.

The individual for whom confinement is sought has the right to an attorney—paid for by the State if the individual is indigent—and any witnesses to testify on his or her behalf that such individual does not represent an immediate and/or foreseeable danger to himself or herself or others and/or that such individual has sufficient support among family, friends, and others that shall deem confinement unnecessary. The individual shall also have the right to present, at the State's expense, any experts who will testify that the individual is not and does not present an immediate and/or foreseeable danger to the community, and such individual shall also have access to all actuarial and clinical instruments to support such contention.

5. EIPA § 1.3: The Type of Confinement Warranted by the Individual's Threat Level<sup>102</sup>

After hearing all of the evidence proffered by both parties, the Court shall have the discretion to enter an Order either: (1) determining that continued confinement is not necessary because the individual does not satisfy the statutory factors governing involuntary confinement; (2) stating that continued confinement is necessary because the individual represents, by clear and convincing evidence, a threat to himself or herself or others, has engaged in at least one overt act of violence in the last thirty (30) days, and is likely to commit a further act of violence in the immediate and/or foreseeable future; or (3) that the individual has sufficient support among family, friends, and others such that an immediate and/or foreseeable act of violence is not likely to occur. Based upon the Court's determination regarding the level of risk presented by the individual, the following treatment options shall be available:

a. EIPA § 1.3(a): Voluntary Commitment

At any time prior to or during the hearing, the individual may knowingly, voluntarily, and willingly consent to a period of confinement in which the individual is subject to intervention and treatment. This consent is conditioned upon the State detailing to the individual the nature and purpose of confinement, the specific type of treatment he or she shall receive, and the estimated duration of confinement. Should the State fail to delineate any of these components to the individual, informed consent cannot be valid as a matter of law.

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<sup>102</sup> See Parry, *supra* note 2, at 322–23 (detailing types of civil commitment).

b. EIPA § 1.3(b): Outpatient Commitment

After the plenary hearing in which the Court considers all evidence and determines the level and nature of risk presented by the individual, it shall have within its discretion the authority to order the individual to undergo an outpatient commitment program. The reasons underlying such decision may include, but are not limited to: (1) the individual having a sufficient support structure (i.e., family, friends, and others associated with the individual who can provide for the individual's basic needs and ensure his or her safety as well as that of others); (2) the determination that the individual is not at risk to commit a violent act in the immediate and/or foreseeable future; or (3) the individual presenting an alternative, outpatient program that the Court deems sufficient to ensure successful treatment by the least restrictive means possible. Should outpatient treatment fail, however, the State shall have within its authority the power to petition the Court that in-patient treatment is necessary to address and treat the individual's violent proclivities.

c. EIPA § 1.3(c): In-Patient Commitment

After a plenary hearing, if the Court determines that the individual poses an immediate and/or foreseeable threat to himself or herself or others, it shall have the power to enter an Order authorizing the involuntary in-patient commitment of such individual. Such decision, however, will be contingent upon a specific treatment plan designed by the State detailing the procedural and substantive aspects that are intended to ensure a successful outcome within a particular time period.

6. EIPA § 1.4: The Time Constraints and Procedures  
Governing In-Patient Confinement

Should the State present clear and convincing evidence that the individual poses an immediate and/or foreseeable threat to himself or herself or others, the State shall, as stated above, specify an initial time period—the first stage of confinement—within which it believes it can successfully implement the particular treatment plan. In any case, the State may not petition for the first stage of confinement of any individual for a period exceeding thirty (30) days. The Court shall then review the State's evidence and independently set forth the timeframe governing the first stage of confinement.

Thereafter, the State must reappear before the Court every fifteen (15) days to demonstrate that: (1) the individual is receiving the treatment plan as outlined in its initial petition for confinement and

(2) the individual's treatment is proceeding successfully. If, however, the State believes that an alternative treatment plan may be or is necessary, it must present to the Court, by clear and convincing evidence, why such treatment is necessary. At this hearing, the State shall also inform the Court whether the individual is likely to be discharged after the initial thirty (30) day period or whether confinement after that period may be necessary. The procedures for extended confinement beyond the initial thirty (30) day period are set forth in EIPA § 1.5.

At anytime during his or her confinement, the individual shall have the opportunity to petition to the Court that: (1) confinement is no longer necessary because such individual does not present an immediate and/or foreseeable risk to himself or herself or others; (2) the State is not providing the individual with the specific treatment plan that it proffered before the Court justifying the first thirty (30) day stage of confinement; (3) the defendant has been treated to such an extent that, with the support of family, friends, and others, he or she is not an immediate and/or foreseeable harm to others; or (4) there are lesser restrictive means (i.e., outpatient commitment) that will be reasonably likely to result in a successful treatment outcome.

7. EIPA § 1.5: Extended Confinement Beyond the First  
Thirty (30) Day In-Patient Confinement Period

Prior to the expiration of the initial thirty (30) day period, the State shall have the right to petition the Court that confinement beyond the thirty (30) day period is necessary. Importantly, however, the State may not base its justification upon the evidence used to support the initial thirty (30) day confinement petition. The State must adduce, by clear and convincing evidence, that continued confinement is necessary because, *inter alia*: (1) the individual's treatment plan requires more time to ensure a successful outcome; (2) the individual has not fully complied with the treatment plan, thus necessitating an extended period to ensure a successful outcome; or (3) the individual remains an immediate and/or foreseeable threat, based upon new evidence, which justifies continued confinement.

At this hearing, the individual shall have the right to State-appointed counsel as well as experts who may testify that continued confinement is no longer necessary because, *inter alia*: (1) the treatment plan has been successful to a sufficient extent that the individual can live safely in the community and no longer represents an immediate and/or foreseeable harm to himself or herself or others or (2) the treatment plan is not—or will not be—successful in assisting

the individual and that alternative methods will be both available and more effective.

8. EIPA § 1.6: Maximum Term of In-Patient Confinement

In each case that concerns the involuntary confinement of an individual, the maximum term within which such individual may be confined shall not exceed ninety (90) days.

9. EIPA § 1.7: Post-Release Procedures

After the individual is released from confinement, the State shall have no authority to petition for that individual's re-confinement unless new evidence emerges demonstrating that such individual: (1) presents an immediate and/or foreseeable threat of harm to himself or herself or others; (2) has engaged in at least one overt act of violence within the past thirty (30) days; or (3) presents at least two of the factors known to be a direct or substantial cause of violent behavior and at least one additional factor known to be an early and immediate signs of violent behavior.

*B. Objections to this Proposal*

There are likely to be several objections to this proposal, based upon both constitutional and workability grounds. These objections are important and necessary because they directly influence how the statute should be drafted, implemented, and administered. The two primary objections to this proposal will be that: (1) confining an individual before the commitment of any criminal act violates an individual's liberty interest under the Constitution, and (2) there is no way to accurately predict whether an individual is likely to engage in violent behavior, thus rendering confinement unworkable and *de facto* punitive.

1. Involuntary Confinement of Individuals  
Reasonably Likely to Engage in Immediate and/or  
Foreseeable Acts of Violence Is Tantamount to  
Confining an Individual Before Any Criminal Act Has  
Been Committed

The first—and perhaps primary—objection to this proposal is that it seeks to confine innocent individuals based upon a belief that they will, at some point in the future, commit a criminal act. This type of confinement not only violates an individual's liberty interest under the substantive due process clause of the Fourteenth Amendment but also transgresses the very foundation upon which the depri-

vation of liberty is founded—that an individual must engage in a criminal act *before* confinement is warranted.

This argument has superficial appeal but fails when considered in light of the current policies governing involuntary confinement. First, involuntary in-patient confinement of the dangerous and mentally ill is already authorized in every state in the country. When confinement is ordered, such individuals have neither violated criminal law nor engaged in overt acts indicating that they will commit acts of violence in the imminent future. In fact, courts at the state level have held that commitment of the dangerous and mentally ill is warranted even where such individuals have committed no overt act whatsoever indicating the propensity for violence.<sup>103</sup> To make matters worse, many state statutes have dispensed with the requirement that the individual pose a threat of “imminent” harm and have instead authorized confinement, for example, where there exists a “substantial likelihood” that a violent act will occur in the near future.<sup>104</sup>

Consequently, by requiring no overt act or imminent threat of harm, these statutes emphasize and seek to confine those who have a mental illness. This is particularly troubling because there is no direct causal relationship between mental illness and violent behavior. The American penal system already confines people for reasons that have nothing to do with violations of the law, at any time, or for any reason. The current involuntary commitment statutes confine mentally ill individuals who present no harm whatsoever to themselves or others.

The proposed statute, however, goes further in protecting an individual’s substantive and procedural due process rights. The individual must, based upon numerous factors including actuarial assessments and early and imminent warning signs that bear a causal relationship to violent behavior, present a danger to himself or herself or others. The individual also must have engaged in at least one overt act of violence within the past thirty days. Thus, the finding of dangerousness is based more upon the facts of a particular case rather than upon predictions of or assumptions that an individual may engage in a violent act.

Moreover, the State has a substantial burden to justify the first and continued stages of confinement. The State must set forth a specific treatment plan that is likely to successfully rehabilitate the individual, and continued confinement past the initial thirty day period is

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<sup>103</sup> See *supra* Part II.C.2.

<sup>104</sup> See, e.g., FLA. STAT. ANN. § 394.467(1) (West 2011).

based solely upon the efficacy of the treatment and whether such treatment either needs to be continued or altered to ensure a successful outcome. In this way, the statute is not punitive in nature. It is rehabilitative and utilitarian because it strives to ensure proper treatment and thus promote increased public safety.

Finally, at any time, the individual can petition the court for immediate release or for a less restrictive means of confinement (i.e., an outpatient treatment plan). In any event, confinement can last no longer than ninety days. Consequently, by focusing upon an individual's behaviors (prior overt acts and warning signs directly linked to criminal behavior), this proposal creates a much more solid basis upon which to justify confinement. Furthermore, by excluding mental illness from this statute, it explicitly—and properly—recognizes that mentally ill individuals are not inherently prone to violence. The only instance in which a mentally ill individual should be confined is when the elements of the proposed statute are satisfied. If the elements are satisfied, it will likely not be the result of a mental illness but environmental and biological factors that warrant treatment.

2. There Is No Method by Which to Accurately Predict  
Whether an Individual Is Reasonably Likely to Engage  
in Violent Behavior

Some may argue that there is no way to accurately predict whether and individual is reasonably likely to engage in violent behavior. This argument is partially true but depends upon the tools that are used to assess the likelihood of future dangerousness. For example, clinical evidence, namely the testimony of experts concerning whether an individual is likely to engage in future acts of violence, is notoriously unreliable. Expert testimony concerning future dangerousness is not very accurate. In 1983, in the context of long-term sentencing, the American Psychiatric Association stated the following:

Psychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness in a capital case, at least in those circumstances where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area . . . Medical knowledge has simply not advanced to the point where long-term predictions . . . may be made with even reasonable accuracy . . . [E]ven under the best of conditions, psy-



chiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.<sup>105</sup>

As one commentator explains, “peer-reviewed research . . . has more recently bolstered these conclusions.”<sup>106</sup> Specifically, “[m]ental health professionals themselves are entirely skeptical of their own predictions, [and] academics appear to have unanimously accepted that such professionals are unreliable.”<sup>107</sup> For example, a dangerousness prediction in the capital context has been described as “sobering, both in its inability to discriminate who will and will not engage in violent misconduct in prison and in the minority who fulfill the prediction.”<sup>108</sup> These studies reveal “low quality control for . . . dangerousness assertions and unreliability of the predictions in general.”<sup>109</sup>

Furthermore, “more recent and more methodologically sound studies indicate that mental health professionals are [only] moderately better than chance in predicting long-term dangerousness.”<sup>110</sup> Moreover, “[e]ven with extensive interviewing . . . studies show that clinical predictions do not improve substantially.”<sup>111</sup> As a result, the existing literature suggests that: (1) mental health practitioners’ future violence predictions are inaccurate; (2) they lack training in making future dangerousness predictions; and (3) based upon a number of factors, clinicians often overestimate rates of future violence.<sup>112</sup>

Importantly, the proposed statute does not rely upon or even utilize clinical testimony. Instead, it incorporates several instruments, including the HCR-20, PCL-R, and Level of Service Inventory, which contain factors that are known to accurately predict whether an individual is likely to engage in violent behavior.<sup>113</sup> Furthermore, this

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<sup>105</sup> Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 161 (2008) (emphasis added).

<sup>106</sup> *Id.* (citing Amicus Brief of the American Psychiatric Ass’n for Petitioner at 14, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080), 1982 U.S. Briefs 6080 (1982)).

<sup>107</sup> *Id.*

<sup>108</sup> Mark D. Cunningham, Thomas J. Reidy, & Jon R. Sorensen, *Assertions of “Future Dangerousness” at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 31 LAW & HUM. BEHAV. 46, 61 (2008).

<sup>109</sup> Shapiro, *supra* note 105, at 163.

<sup>110</sup> Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 LAW & PSYCHOL. REV. 63, 85 (2005).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 86.

<sup>113</sup> *See supra* note 99.

proposal requires that, prior to confinement, an individual must engage in an overtly violent act, indicating a violence assessment that is specific to the individual. The proposed statute, therefore, does not use the types of unreliable clinical testimony that lie at the heart of this argument and for that reason, the argument fails.

#### V. CONCLUSION

The massacre at Columbine could have, or at least may have, been prevented if Dylan Klebold and Eric Harris were subjected to state intervention and confinement based upon their likelihood of engaging in immediate and foreseeable acts of violence. Klebold and Harris created a website naming specific students that they wanted to murder. They possessed and accumulated firearms. They drafted stories of an extremely violent and horrific nature. These behaviors did not merely suggest that they were planning on committing one of the worst acts of school violence in our Nation's history; they essentially broadcasted their plans to everyone and anyone who paid attention. However, if anyone in Colorado sought to involuntarily commit either of these individuals, they would have had the unnecessary burden of demonstrating that Klebold and Harris were mentally ill.

Mental illness, however, is not causally related to violent behavior. It is likely that any attempts to confine them would have failed. Under the proposed statute delineated above, they would have never walked away from the courtroom. They would have been involuntarily confined in an in-patient setting. Similarly, Seung Hui Cho would have been identified as an immediate danger to the community. His confinement may have prevented the Virginia Tech tragedy. The same holds true for other individuals who engage in acts of violence, whether they are stalkers or those who engage in repeated acts of domestic violence. We should not have to wait for forty-five students to be killed in order to intervene. We can stop violence before it happens, and we should begin to do so now.