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The Rx and the AR: A Products Liability Approach to the Mass Shooting Problem

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THE RX AND THE AR: A PRODUCTS LIABILITY APPROACH TO THE MASS SHOOTING PROBLEM

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I. INTRODUCTION

With mass murders on the rise, the public demanded legislative action to ameliorate the issue. Thus far, the legislature’s response has been primarily comprised of gun reform proposals.¹ Congress has been flooded with bills and acts that call for stricter licensing practices, more in-depth background checks, or bans on assault weapons and high capacity magazines.² However, the solution to the mass murder problem does not likely lie within gun control, but rather, within prescription drug control.³ Antidepressant and antipsychotic medications are known to increase suicidal, homicidal, and violent tendencies in some users.⁴ Individuals such as James E. Holmes, Seung-Hui Cho, and Eric Harris were prescribed antidepressant or antipsychotic medications.⁵ Afterward, these same individuals committed the mass murders at Aurora Century movie theater, Virginia Polytechnic

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1. See Jana R. McCreary, “*Mentally Defective*” Language in the Gun Control Act, 45 CONN. L. REV. 813, 831 (2013).

2. See *id.* at 832; JEFFREY A. ROTH & CHRISTOPHER S. KOPER, NAT’L INST. OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994–96 1 (1999).

3. Jerome R. Corsi, *Psych Meds Linked to 90% of School Shootings*, WND (Dec. 18, 2012, 10:16 PM), <http://www.wnd.com/2012/12/psych-meds-linked-to-90-of-school-shootings/>; Bob Unruh, *Are Meds to Blame for Cho’s Rampage?*, WND (Apr. 23, 2007, 1:00 AM), <http://www.WND.com/2007/04/41218>.

4. Corsi, *supra* note 3; Unruh, *supra* note 3.

5. Corsi, *supra* note 3; see McCreary, *supra* note 1, at 823, 824 n.54.

Institute and State University, and Columbine High School, respectively.⁶ A simple analogy illustrates the point.

A drunk driver swerves off of the road and onto a crowded sidewalk, killing some and injuring others. Nobody blames the vehicle. Legislators do not call for sports car bans. The Department of Motor Vehicles is not criticized for its failure to perform a more thorough background check before issuing the driver's license. Rather, society blames alcohol and its ability to impair normal human functions.

Contrastingly, a drug-addled college student storms onto campus and proceeds to slaughter thirty-two students with two semiautomatic handguns: A Walther P22 .22 caliber and a Glock 19 9-mm.⁷ A sizeable number of people blame the firearms.⁸ Legislators call for assault weapon bans and high capacity magazine bans.⁹ The Bureau of Alcohol, Tobacco, and Firearms ("ATF") is criticized for its inability to establish an effective federal background check system.¹⁰ Very few people blame the college student's prescription medication and its ability to induce suicidal, homicidal, and violent behavior.¹¹

This article proposes that the gun—like the car—should not be the subject of further regulation.¹² Antidepressant and antipsychotic medications should bear the blame for their capacity to induce violent behavior in users.¹³ As such, the pharmaceutical industry—not the gun industry—should be the legislature's focus if the mass murder problem is to be solved.¹⁴

This article begins with an overview of American gun control to date.¹⁵ It then analyzes the legislature's failure to curb mass shootings through stricter gun laws.¹⁶ In doing so, the article negates two common misconceptions: First, that gun control reduces the number of firearms in criminal hands; and second, that a European-style ban on firearms would be a possible and effective solution to the mass shooting problem.¹⁷ While

6. McCreary, *supra* note 1, at 823–24; Corsi, *supra* note 3.

7. McCreary, *supra* note 1, at 824, 829; *see also* Corsi, *supra* note 3; Unruh, *supra* note 3.

8. *See* Unruh, *supra* note 3.

9. *See* ROTH & KOPER, *supra* note 2, at 1.

10. *See* Mark B. Melter, *The Kids are Alright; It's the Grown-ups Who Scare Me: A Comparative Look at Mass Shootings in the United States and Australia*, 16 GONZAGA J. INT'L L. 33, 55–56 (2012).

11. *See* Corsi, *supra* note 3.

12. *See infra* Part IV.

13. *See infra* Part IV.

14. *See infra* Part IV.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part III.

invalidating those false impressions, the article displays how increased gun availability actually lowers mass shooting rates.¹⁸ The article then discusses the link between mass shootings and prescription drug use and details how such violence can actually be a treatment-induced problem.¹⁹ Finally, the article closes with a new way for legislators to respond to the mass murder problem.²⁰ This involves a shift in responsibility from the gun industry to the pharmaceutical industry by putting liability on the latter, and requiring drug compatibility tests to be administered prior to prescribing a medication.²¹

II. THE HISTORY OF AMERICAN GUN LEGISLATION

Modern gun control debates in the United States are typically preceded by a tragic event; most often it is a mass shooting.²² However, prior to the 1900s, gun control laws were enacted in response to slave uprisings and were primarily aimed at keeping slaves and freedmen from obtaining firearms.²³ In 1911, New York enacted the Sullivan Law as a response to the widely publicized shooting of novelist David Graham Phillips.²⁴ The Sullivan Law required that a permit be obtained before an individual was allowed to possess or carry a handgun.²⁵ This was among the first major forms of gun control outside of the South.²⁶

Prohibition in 1919 spurred alcohol smugglers and distillers to engage in turf wars with one another, culminating in the St. Valentine's Day Massacre ten years later.²⁷ Such extreme gun violence prompted legislators to pass the National Firearms Act ("NFA"), which targeted the gangs' weapons of choice: Machine guns and short-barreled shotguns.²⁸ This Act did not expressly prohibit the possession of such arms, but it did make ownership of them financially infeasible.²⁹ For example, the Thompson M1928 ("Tommy Gun")—a notoriously popular gun for smugglers and

18. See *infra* Part III.

19. See *infra* Part IV.

20. See *infra* Part V.

21. See *infra* Part V.

22. McCreary, *supra* note 1, at 831; Corsi, *supra* note 3.

23. David B. Kopel, *The Great Gun Control War of the Twentieth Century—and Its Lessons for Gun Laws Today*, 39 FORDHAM URB. L.J. 1527, 1529 (2012).

24. Peter Duffy, *100 Years Ago, a Killing that Spurred a Gun Law*, N.Y. TIMES, Jan. 24, 2011, at A.21; *Author Phillips Shot Six Times; May Recover*, N.Y. TIMES (Jan. 24, 1911), <http://query.nytimes.com/mem/archive-free/pdf?res=F20911F93C5517738DDDAD0A94D9405B818DF1D3>.

25. Kopel, *supra* note 23, at 1529.

26. *Id.*

27. *Id.* at 1531.

28. See *id.* at 1531, 1533.

29. See *id.*

gangsters—typically sold for around two hundred dollars in that time period.³⁰ The NFA placed a two hundred dollar flat tax for possessing that gun, as well as any other machine gun or short-barreled shotgun.³¹ Hence, owning a Tommy Gun after the ratification of the NFA would cost four hundred dollars.³² Taking inflation into consideration, that is the equivalent of \$5,386.29 today, thus making possession of such a weapon practically unachievable.³³

Shortly after the NFA, Congress passed the Federal Firearms Act of 1938 (“FFA”).³⁴ Under this Act, firearms dealers had to keep a record of all gun sales and obtain a license before they could acquire or ship any weapon over state lines.³⁵ Additionally, the Act made it “unlawful for any person who [was] convicted of a [violent crime] ‘to receive any firearm or ammunition which had been shipped’” over state lines; as such, firearms dealers were responsible for ascertaining that any prospective buyer had not been previously convicted of a violent crime.³⁶

In 1939, the NFA and the FFA were discussed in detail by the Supreme Court of the United States in *United States v. Miller*.³⁷ In that case, two defendants were charged with violating the NFA and the FFA when they transported a sawed-off, double-barreled shotgun over state lines.³⁸ In response, the defendants argued that the Acts violated their Second Amendment rights.³⁹ Justice McReynolds, writing for the majority, found that the Second Amendment did not protect the individual right to possess a sawed-off double-barrel shotgun since it was not a common-use weapon and bore no relationship to the preservation of a well-regulated militia.⁴⁰ Although the Court tried to make it clear that the right to bear arms was an individual right rather than a collective or states’ right,⁴¹ the decision in

30. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, THE FBI: A CENTENNIAL HISTORY, 1908–2008 16 (2008); see BILL YENNE, TOMMY GUN: HOW GENERAL THOMPSON’S SUBMACHINE GUN WROTE HISTORY 86 (2009).

31. Kopel, *supra* note 23, at 1533.

32. See YENNE, *supra* note 30, at 86; Kopel, *supra* note 23, at 1533.

33. See U.S. Dep’t of Labor, *CPI Inflation Calculator*, BUREAU LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 16, 2014).

34. 15 U.S.C. § 902(f) (1938) (current version at 18 U.S.C. § 922 (2012)); Kopel, *supra* note 23, at 1533–34.

35. 15 U.S.C. § 902(f); Kopel, *supra* note 23, at 1534.

36. 15 U.S.C. § 902; *United States v. Tot*, 131 F.2d 261, 263 (3d Cir. 1942), *rev’d*, 319 U.S. 463 (1943); Kopel, *supra* note 23, at 1534.

37. 307 U.S. 174 (1939).

38. *Id.* at 175.

39. *Id.* at 176.

40. *Id.* at 175, 178.

41. *District of Columbia v. Heller*, 554 U.S. 570, 579–80, 592 (2008).

Miller resulted in nationwide misinterpretation of the Second Amendment.⁴² One example comes from *Commonwealth v. Davis*,⁴³ in which the state's supreme court said:

[T]he declared right to keep and bear arms is that of the people, the aggregate of citizens; the right is related to the common defense; and that in turn points to service in a broadly based, organized militia.

.....

[The Second Amendment] is not directed to guaranteeing the rights of individuals, but rather, as we have said, to assuring some freedom of State forces from national interference.⁴⁴

From 1939 to 2008, courts across the United States erroneously used *Miller* to justify otherwise unconstitutional restrictions on Second Amendment rights.⁴⁵

In 1967, New York City mandated long-gun registration.⁴⁶ Eventually, the registry information was used to confiscate those firearms after the city council erroneously decided that rifles and shotguns were assault weapons.⁴⁷ When federal legislators attempted to adopt New York City's gun registration methods, the House of Representatives amended statutes to explicitly forbid federal agencies from compiling any information that could be used for a national gun registry.⁴⁸

The Gun Control Act of 1968 ("GCA") slightly altered the record-keeping requirements set forth by the FFA.⁴⁹ It required firearms dealers to record a buyer's personal information and the gun's identifying features such

42. *Id.* at 627 (citing *Miller*, 307 U.S. at 179); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (citing *Miller*, 307 U.S. at 178); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (citing *Miller*, 307 U.S. at 178); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd*, 319 U.S. 463 (1943) (citing *Miller*, 307 U.S. at 174); *Commonwealth v. Davis*, 343 N.E.2d 847, 850 (Mass. 1976) (citing *Miller*, 307 U.S. at 177–78); *Kopel*, *supra* note 23, at 1550.

43. 343 N.E.2d 847 (Mass. 1976).

44. *Id.* at 848–50.

45. *Warin*, 530 F.2d at 106–07 (citing *Miller*, 307 U.S. at 178); *Stevens*, 440 F.2d at 149 (citing *Miller*, 307 U.S. at 178); *Tot*, 131 F.2d at 266 (citing *Miller*, 307 U.S. at 174); *Davis*, 343 N.E.2d at 850 (citing *Miller*, 307 U.S. at 177–78).

46. *Kopel*, *supra* note 23, at 1541.

47. *Id.*

48. *Id.* at 1565–66.

49. *Id.* at 1534, 1545. Compare 18 U.S.C. § 922(b)(5) (2012), with 27 C.F.R. § 478.11 (2014).

as its model and serial number on Form 4473 for each gun sale.⁵⁰ Although Form 4473 is a federal form, the gun sale would be registered by the dealer and “would not be collected in a [national] registration list.”⁵¹ The pool of civilians who were legally allowed to purchase or possess a firearm from a licensed dealer was also the subject of GCA restrictions.⁵² Whereas the FFA only prohibited gun sales to individuals convicted of a violent crime, the GCA further prohibited gun and ammunition sales to illicit drug users and those who were *mentally defective*.⁵³

In the years following the enactment of the GCA, the phrase *mentally defective* was interpreted differently by courts across the United States.⁵⁴ In 1973, the Eighth Circuit decided that a mental illness was not synonymous to a mental defect.⁵⁵ Rather, the court determined that “[a] mental defective . . . is a person who has never possessed a normal degree of intellectual capacity, whereas . . . an insane person[’s] faculties which were originally normal have been impaired by [a] mental disease.”⁵⁶ Therefore, in the Eighth Circuit, individuals with a subnormal level of intelligence were barred from owning guns, but individuals suffering from schizophrenia, bipolar disorder, or a personality disorder were entitled to full Second Amendment rights.⁵⁷

In *Huddleston v. United States*,⁵⁸ the Supreme Court attempted to improve the lower courts’ ability to analyze the language of the GCA’s prohibited persons categories.⁵⁹ The Court stated that the ultimate goal of the GCA was to keep “lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow.”⁶⁰ Although this statement may have provided lower courts with the legislative

50. Kopel, *supra* note 23, at 1545; *see also* 18 U.S.C. § 922(b)(5).

51. Kopel, *supra* note 23, at 1545–46.

52. McCreary, *supra* note 1, at 816.

53. Kopel, *supra* note 23, at 1546; McCreary, *supra* note 1, at 816. *Compare* 18 U.S.C. § 922(d)(4) (2012), *with* 27 C.F.R. § 478.11 (2014).

54. *See* *United States v. Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012); *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988); *United States v. Hansel*, 474 F.2d 1120, 1123–24 (8th Cir. 1973); *United States v. Vertz*, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000).

55. *Hansel*, 474 F.2d at 1124.

56. *Id.*

57. *Id.* at 1125; McCreary, *supra* note 1, at 818 n.17, 844–45.

58. 415 U.S. 814 (1974).

59. *Id.* at 823, 825.

60. *Id.* at 825.

intent behind the Act, it merely replaced the phrase *mentally defective* with *mentally disordered*, which did little to actually clarify the definition.⁶¹

The ATF eventually revised its definition of the *mentally defective* class of individuals who were not allowed to possess a firearm.⁶² To belong to this class, an individual needed:

- (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
 - (1) Is a danger to himself or to others; or
 - (2) Lacks the mental capacity to contract or manage his own affairs.
- (b) The term shall include—
 - (1) A finding of insanity by a court in a criminal case; and
 - (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility⁶³

Correspondingly, there was no longer an issue as to whether *mentally defective* referred to mental illness or subnormal intelligence; the term encompassed both characteristics, and either one could disqualify an individual from firearm possession.⁶⁴ However, courts faced a new problem: Whether commitment to a mental institution qualified as an adjudication of mental defectiveness.⁶⁵

In *United States v. Giardina*,⁶⁶ the Fifth Circuit found that involuntary hospitalization would not disqualify an individual from the right to buy and possess a firearm under the statute.⁶⁷ The court in *United States v. Vertz*⁶⁸ went even further, finding that adjudication by a probate judge that a defendant required treatment because he was mentally ill was “not

61. McCreary, *supra* note 1, at 846 (noting that courts have been known to *muddy the waters* when it comes to interpreting the meaning of mentally defective). Compare 18 U.S.C. § 922(d)(4) (2012), with *Huddleston*, 415 U.S. at 825.

62. 27 C.F.R. § 478.11 (2014).

63. *Id.*

64. *Id.*

65. See *United States v. Rehlander*, 666 F.3d 45, 47, 49 (1st Cir. 2012); *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988); *United States v. Vertz*, 102 F. Supp. 2d 787, 791 (W.D. Mich. 2000).

66. 861 F.2d 1334 (5th Cir. 1988).

67. *Id.* at 1337.

68. 102 F. Supp. 2d 787 (W.D. Mich. 2000).

sufficient to bring [the defendant] within the statute,” because “[t]he probate court made no finding that [the defendant] was a danger to himself.”⁶⁹ Finally, *United States v. Rehlander*⁷⁰ established that full due process of law was required before any individual’s Second Amendment rights could be denied; as such, a voluntary commitment to a mental institution or a commitment for observation would not bar an individual from buying a firearm in the future.⁷¹ Although the ATF’s new definition was intended to clarify the Legislature’s intent in enacting the GCA—“keeping ‘[guns] out of the hands of . . . [those] whose possession of them is too high a price in danger’”—it seems as though it just shifted the courts’ focus further away from public safety concerns, and onto the Fifth Amendment rights of the mentally ill.⁷²

In 1986, Congress decided that “the rights of citizens to keep and bear arms under the Second Amendment to the United States Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies.”⁷³ Accordingly, the Firearms Owners’ Protection Act (“FOPA”) was made law that year.⁷⁴ Originally, one of the major proposals of the Act would have banned most of the center-fire rifle ammunition in the United States, since Republican Mario Biaggi put forward a *cop-killer bullet* ban and over-broadly defined what that would include.⁷⁵ Fortunately, the National Rifle Association made a compromise with Biaggi and modified the text of the Act to simply “ban[] a category of ammunition that was no longer being produced for the retail market.”⁷⁶ In addition to banning certain types of ammunition, “FOPA . . . banned the sale of new machine guns . . . to the public,” placed restrictions on the ATF’s power, forbade federal gun registration, and required firearms dealers to report certain gun sales directly to the Attorney General.⁷⁷ Specifically, FOPA required firearms dealers to provide a report to the Attorney General when any one purchaser bought two or more firearms within a five-day period.⁷⁸

Although the FFA, GCA, and FOPA all specified classes of the population that were ineligible to purchase a firearm, licensed firearms

69. *Id.* at 788.

70. 666 F.3d 45 (1st Cir. 2012).

71. *Id.* at 48–49.

72. *Huddleston v. United States*, 415 U.S. 814, 825 (1974).

73. Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 1, 100 Stat. 449, 449 (1986) (codified as amended at 18 U.S.C. § 922 (2012)).

74. *Id.*

75. Kopel, *supra* note 23, at 1572.

76. *Id.* at 1573.

77. § 103, 100 Stat. at 455; Kopel, *supra* note 23, at 1574.

78. § 103, 100 Stat. at 455.

dealers had no way of confirming a prospective buyer's eligibility.⁷⁹ Purchasers simply had to certify in writing that they were not a member of a disqualified class—such as a convicted felon or adjudicated as mentally defective—and the licensed dealer had to trust that this information was true.⁸⁰ Of course, ineligible individuals wishing to obtain a firearm were inclined to falsely certify their eligibility, so in 1993, Congress attempted to ameliorate this problem through the Brady Handgun Violence Prevention Act (“Brady Bill”).⁸¹

The Brady Bill mandated a five-day waiting period before a licensed dealer could release a gun to a purchaser.⁸² In that five-day period, licensed dealers collaborated with the local chief law enforcement officers, who conducted a background check to verify the purchaser's eligibility.⁸³ Five years later, the waiting period requirement expired pursuant to the terms of the Brady Bill and was replaced with the National Instant Criminal Background Check System (“NICS”).⁸⁴ The NICS, maintained by the Federal Bureau of Investigation (“FBI”), cut out the chief local law enforcement middleman and allowed firearms dealers themselves to conduct background checks on potential buyers.⁸⁵ To accommodate a prospective gun buyer's right to privacy, the NICS background check would only reveal the buyer's eligibility status, and not the reason behind it; i.e., the system would only display *ineligible* rather than adjudicated as *mentally defective*.⁸⁶ Unfortunately, even this system had its glitches.⁸⁷ State agencies with information related to a person belonging to a class of prohibited purchasers were under very little pressure to report this information to the FBI.⁸⁸ Consequently, compliance with reporting procedures was infrequent and the NICS was rarely up to date, resulting in a prospective purchaser's ineligibility failing to show up on the NICS for months.⁸⁹ In addition, “only ‘licensed’ importers, manufacturers, and dealers [were] federally mandated

79. United States v. Tot, 131 F.2d 261, 263 (3d Cir. 1942), *rev'd*, 319 U.S. 463 (1943); Kopel, *supra* note 23, at 1534, 1546; McCreary, *supra* note 1, at 833.

80. Kopel, *supra* note 23, at 1546; McCreary, *supra* note 1, at 833–34.

81. McCreary, *supra* note 1, at 834–35.

82. *Id.* at 835.

83. *Id.*

84. Kopel, *supra* note 23, at 1582–83; Melter, *supra* note 10, at 55.

85. Melter, *supra* note 10, at 55.

86. See McCreary, *supra* note 1, at 854.

87. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, U.S. DEP'T OF JUSTICE, STATE LAWS AND PUBLISHED ORDINANCES xiii–xv (31st ed. 2010–2011), available at <https://www.atf.gov/files/publications/download/p/atf-p-5300-5-31st-edition/2010-2011-atf-book-final.pdf>; McCreary, *supra* note 1, at 837–38; Melter, *supra* note 10, at 55.

88. See McCreary, *supra* note 1, at 835–36.

89. See *id.* at 838.

to perform background checks on weapons purchasers,” which meant that private firearms sales—including sales at gun shows—could be conducted legally without inquiry into a purchaser’s eligibility.⁹⁰ Furthermore, concealed carry permits and similar firearms licenses qualified as alternatives to the background check requirements of the Brady Bill in nineteen states.⁹¹ Although a background check is almost always required in order to obtain any sort of weapons permit, states had no federal obligation to keep permit record information on a readily accessible database for licensed firearms dealers to access.⁹²

The NICS Improvement Act recognized that there were problems with the Brady Bill’s background check requirement, but failed to correctly identify them.⁹³ Rather than providing incentives for state agency reporting compliance, closing the gun show loophole, or eliminating the license alternative to a background check, it merely required federal agencies with any information regarding an individual’s ineligibility to “report that information to the Attorney General . . . quarterly.”⁹⁴

In 1994, the Clinton Crime Bill was enacted as a response to Patrick Purdy’s mass murder in Stockton, California, and the intensifying turf and drug wars conducted by gangs.⁹⁵ It included one of the most irrational and functionally inconsequential assault weapon bans in the history of American gun control, ironically titled the Public Safety and Recreational Firearms Use Protection Act.⁹⁶ The ban outlawed a mere nineteen guns by name, some of which had already been banned since 1989.⁹⁷ Of the nineteen explicitly-banned guns in the Act, there were at least twelve legal substitutes already on the market.⁹⁸ The Act also banned roughly two hundred more guns based on “appearances [and] . . . accessories such as bayonet lugs and adjustable stocks,” under what was called the Features Test.⁹⁹

(30) The term “semiautomatic assault weapon” means—

....

90. Melter, *supra* note 10, at 55–56.

91. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, *supra* note 87, at xiv–xv.

92. *See id.*; McCreary, *supra* note 1, at 835.

93. *See* McCreary, *supra* note 1, at 837–38.

94. *See id.* at 837.

95. ROTH & KOPER, *supra* note 2, at 1; Kopel, *supra* note 23, at 1585.

96. *See* ROTH & KOPER, *supra* note 2, at 1; Kopel, *supra* note 23, at 1585–86.

97. ROTH & KOPER, *supra* note 2, at 2–3; Kopel, *supra* note 23, at 1585.

98. ROTH & KOPER, *supra* note 2, at 3.

99. ROTH & KOPER, *supra* note 2, at 4; Kopel, *supra* note 23, at 1585–86.

(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least [two] of—

- (i) a folding or telescoping stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a bayonet mount;
- (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
- (v) a grenade launcher¹⁰⁰

The Features Tests for semiautomatic pistols and shotguns were similarly focused on aesthetics.¹⁰¹ The overbroad and generic nature of the Features Test allowed firearms manufacturers to disconnect the frills, rename the weapons, and ultimately sell guns that were “operationally the same as the banned guns.”¹⁰² Moreover, roughly six hundred firearms, such as the Ruger Mini-14, were explicitly exempted from the ban because of their large ownership base even though they were “functionally identical to banned guns like the AR-15.”¹⁰³

The Act also banned the sale of high capacity magazines—defined as “ammunition-feeding devices designed to hold more than [ten] rounds”—but did not outlaw possession or use of them.¹⁰⁴ As such, this ban was futile as well because “when one considers many of the older model guns . . . such as the AR-15 (in production since the 1960s) . . . the world-wide inventory of ammunition magazines holding more than [ten] rounds was probably in the tens or even hundreds of millions.”¹⁰⁵

Paradoxically, the most notable effect of the assault weapons ban was the influx of so-called assault weapons into civilian hands.¹⁰⁶ While the Act was being debated in Congress, the production of soon-to-be-banned guns such as the Colt AR-15, SWD M-10, and TEC-9 skyrocketed.¹⁰⁷ In 1994, 203,578 assault weapons were produced just before the ban became

100. Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. § 2(b)(30)(B) (1994).

101. *See id.* § 2(b)(30)(C)–(D).

102. Kopel, *supra* note 23, at 1586; *see* ROTH & KOPER, *supra* note 2, at 4.

103. Kopel, *supra* note 23, at 1585–86.

104. ROTH & KOPER, *supra* note 2, at 2; Kopel, *supra* note 23, at 1586.

105. Kopel, *supra* note 23, at 1586.

106. *See* ROTH & KOPER, *supra* note 2, at 4.

107. *Id.* at 3–5.

law later that year.¹⁰⁸ This is in stark contrast to the annual average production of 91,137 assault weapons from 1989 to 1993.¹⁰⁹ Since the market became flooded with assault weapons and high capacity magazines just before the ban was enacted, the price of these commodities dropped significantly the next year.¹¹⁰ Prior to the ban, an AR-15-type rifle sold for anywhere between \$825 and \$1325; by the very next June, the price of the same rifle had fallen to about \$660.¹¹¹ Although the transfer of an assault weapon was prohibited after 1994, individuals who paid a high pre-ban price and then “watched as their investment depreciated after the ban took effect” were prone to sell the weapon at a discount price to an ineligible purchaser, and then report the gun as stolen to an insurance company in order to collect on the policy.¹¹² In essence, the Public Safety and Recreational Firearms Use Protection Act made assault weapons more available and less expensive to those who could not pass a NICS background check.¹¹³ Thankfully, the assault weapon ban expired in 2004.¹¹⁴

The Supreme Court of the United States had a chance to discuss gun bans—albeit a little late—in the 2008 case, *District of Columbia v. Heller*.¹¹⁵ The law at issue in the case “totally ban[ned] handgun possession in the home” and was struck down.¹¹⁶ In making its decision, the Court relied on the common use principle.¹¹⁷ The common use principle dictates that a “prohibition of an entire class of *arms*” is unconstitutional if that class of arms is “overwhelmingly chosen by American[s]” for a lawful use, such as self-defense or sporting.¹¹⁸ Justice Scalia poignantly stated:

It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. . . . There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and

108. *Id.* at 6.

109. *Id.*

110. *Id.* at 5.

111. See ROTH & KOPER, *supra* note 2, at 3, 5.

112. *Id.* at 1, 4–5.

113. See Public Safety and Recreational Firearms Use Protection Act, H.R. 4296, 103d Cong. § 2 (1994); ROTH & KOPER, *supra* note 2, at 5; Melter, *supra* note 10, at 55–56.

114. H.R. 4296 § 6(2); Kopel, *supra* note 23, at 1604.

115. 554 U.S. 570, 573 (2008).

116. *Id.* at 628, 635.

117. *Id.* at 627; Kopel, *supra* note 23, at 1608; Melter, *supra* note 10, at 46.

118. *Heller*, 554 U.S. at 627–28.

aim a long gun; it can be pointed at a burglar with one hand
 Whatever the reason, handguns are the most popular weapon
 chosen by Americans for self-defense in the home, and a complete
 prohibition of their use is invalid.¹¹⁹

Under this common use interpretation, a future ban on semiautomatic AR-15s and the like would arguably be unconstitutional as well, because they are some of the most popularly owned guns in America.¹²⁰

III. THE PROBLEMS WITH GUN LEGISLATION

Unfortunately, the GCA and FOPA were not enough to stop Laurie Dann from obtaining a firearm and shooting seven children in 1988.¹²¹ The Acts were insufficient to keep Patrick Purdy from killing five children and wounding thirty others in Stockton, California with a Kalashnikov-style semi-automatic rifle in 1989.¹²² The Public Safety and Recreational Firearms Use Protection Act did not keep Eric Harris and Dylan Klebold from obtaining a Savage-Springfield 67H, Hi-Point 995, TEC-9, or Stevens 311D, all of which were used in 1999 to kill thirteen and wound twenty-four others at Columbine High School.¹²³ The NICS did not reveal that Seung-Hui Cho had been involuntarily committed to a mental institution, and was thus ineligible to buy the Walther P22 and Glock 19 that he used to kill thirty-two people at the Virginia Polytechnic Institute and State University.¹²⁴ These instances alone should indicate that gun control is not effectively reducing mass shootings, but they are only some of the most notable.¹²⁵ As of 1976 under the GCA, until FOPA was enacted, there were 190 mass shootings and 880 victims in America.¹²⁶ In the time span between the enactment of FOPA and the Brady Bill, there were 140 mass shooting

119. *Id.* at 629.

120. EDWARD W. HILL, MAXINE GOODMAN LEVIN COLL. OF URBAN AFFAIRS, CLEVELAND STATE UNIV. HOW MANY GUNS ARE IN THE UNITED STATES? AMERICANS OWN BETWEEN 262 MILLION AND 310 MILLION FIREARMS 3 (2013), available at http://www.urban.csuohio.edu/publications/hill/GunsInTheUS_Hill_032813.pdf; Kopel, *supra* note 23, at 1608.

121. *See* Unruh, *supra* note 3.

122. *See* Kopel, *supra* note 23, at 1578; Unruh, *supra* note 3.

123. Janet L. Kaminski Leduc, *OLR Research Report: Weapons Used in Mass Shootings*, ST. CONN. GEN. ASSEMBLY (Jan. 18, 2013), <http://www.cga.ct.gov/2013/rpt/2013-R-0057.htm>; Unruh, *supra* note 3.

124. McCreary, *supra* note 1, at 824, 829–30; Kaminski Leduc, *supra* note 123; Unruh, *supra* note 3.

125. *See* Melter, *supra* note 10, at 41; Unruh, *supra* note 3.

126. Melter, *supra* note 10, at 60.

incidents and 620 individuals either wounded or killed.¹²⁷ During the era of the Clinton Crime Bill, 193 mass shootings occurred, leaving 875 people either dead or injured.¹²⁸ Since 2004, when the assault weapons ban ended, there have been 178 mass shootings and 969 victims.¹²⁹

Still, about twenty-four percent of the nation's citizens believe that tighter gun restrictions would prevent mass shootings in America.¹³⁰ This is despite the fact that countries with even more stringent gun laws than the United States have had their fair share of mass shootings.¹³¹ England—with a mere 6.2 guns per one hundred people—experienced a mass shooting in 2010, which claimed the lives of twelve citizens.¹³² Germany had “three of the five worst school shootings worldwide over the past fifteen years,” despite the country's incredibly strict gun laws.¹³³ But two instances hardly prove the point: It could be argued that Europeans have only seen about twelve mass public shootings and just over one hundred people killed by gunfire, during those shootings, since 2001, which is notably less than what Americans have experienced in the same time frame.¹³⁴ It is worthy of note, however, that although the number of *mass shooting* incidents in Europe is less than that in America, the number of *mass murders* is roughly the same; perpetrators simply resort to bombs and arson instead of firearms.¹³⁵

Even supposing that the prevalence of guns in the United States is to blame for mass shootings, gun bans have proved ineffective in the past and government seizures of firearms would be just as unsuccessful in reducing gun availability.¹³⁶ There are between 262 and 310 million firearms privately owned in America.¹³⁷ Guns are not registered or tracked, so there is no reliable way for the government to hunt down and seize each one.¹³⁸ Furthermore, pursuant to the Fifth Amendment, gun owners would need to

127. *Id.*

128. *Id.*

129. *Id.* at 60–61; MAYORS AGAINST ILLEGAL GUNS, ANALYSIS OF RECENT MASS SHOOTINGS 6–23 (2013), available at http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/A_U.S.%20news/US-news-PDFs/Analysis_of_Mass_Shootings.pdf.

130. Melter, *supra* note 10, at 42; Amy Roberts, *By the Numbers: Guns in America*, CNN (Aug. 9, 2012, 1:31 PM), <http://www.cnn.com/2012/08/09/politics/btn-guns-in-america>.

131. Melter, *supra* note 10, at 42–43.

132. *Id.* at 43.

133. *Id.*

134. *Id.* at 43–44, 60–61 tbl.1.

135. See “Assault Weapons,” GUNCITE, http://www.guncite.com/gun_control_gcassaul.html (last updated Oct. 24, 2010); see also Melter, *supra* note 10, at 42, 44, 60–61 tbl.1.

136. See Melter, *supra* note 10, at 46–47, 49–51.

137. HILL, *supra* note 120, at 2.

138. *Id.*

be adequately compensated if the government chose to confiscate their property.¹³⁹ This would require “hundreds of millions of taxpayer dollars,” which is simply not in national or states’ budgets.¹⁴⁰ Hence, it is highly unlikely that gun owners would receive even half of the fair market value of their firearms, let alone a single penny for their ammunition and add-ons.¹⁴¹ Even if government agencies were able to confiscate fifty percent of the guns in the United States—with adequate compensation to the owners—over 100 million guns would still remain.¹⁴² Against those numbers, it is difficult to imagine that a potential mass shooter would have any trouble gaining access to a firearm.¹⁴³ As such, a government seizure of guns in America would be operationally impossible, financially impracticable, constitutionally impermissible, and ultimately ineffective.¹⁴⁴

Contrary to popular belief, research shows that the overwhelming presence of firearms actually has a deterrent effect on mass shooters.¹⁴⁵ As one author noted, “mass shootings rarely take place within the hunting aisles of Wal-Mart or at the local shooting range.”¹⁴⁶ In fact, “mass shooter[s] [almost] always pick a location in which” law-abiding citizens will not be armed, such as a school or a place of worship.¹⁴⁷ Conversely, areas where citizens can lawfully carry a concealed handgun are sixty-seven percent less likely to experience a mass-shooting incident.¹⁴⁸ This is primarily because armed civilians are not suitable prey—they possess the ability to neutralize the shooter—and mass shooters are looking for a target, not a duel.¹⁴⁹ In light of this, Americans may want to think twice before they blame mass shootings on the prevalence of firearms.¹⁵⁰

IV. THE LINK TO ANTIDEPRESSANT AND ANTIPSYCHOTIC USE

Mass shooters have more in common than the fact that they all—by definition—used a firearm to effectuate death and injury.¹⁵¹ This has led

139. U.S. CONST. amend. V; Kopel, *supra* note 23, at 1564.

140. Kopel, *supra* note 23, at 1564.

141. *Id.* at 1564–65.

142. Melter, *supra* note 10, at 51.

143. *Id.*

144. See U.S. CONST. amend. V; HILL, *supra* note 120, at 2, 8 figs.4 & 5 (noting the sheer number of households that contain a firearm); Kopel, *supra* note 23, at 1564; Melter, *supra* note 10, at 49–51.

145. Melter, *supra* note 10, at 41–42.

146. *Id.* at 53.

147. *Id.*

148. *Id.* at 42.

149. See *id.* at 41.

150. See Melter, *supra* note 10, at 41.

151. See *id.*

authors and researchers to propose alternatives to gun control that could be used to arrive at an actual solution to the mass murder problem.¹⁵² For instance, most mass shooters have a documented history of mental illness.¹⁵³ Hence, numerous researchers have proposed that gun buyers should be required to provide firearms vendors with a certificate guaranteeing the buyer's mental health.¹⁵⁴

While this seems like a viable solution to the mass shooter problem, it suffers from the exact same flaws as previous gun control legislation, but with more of a negative economic impact.¹⁵⁵ Looking at the mental health certificate idea objectively, it is plain to see that it is just an additional form of permit or background check that gun purchasers would need to supply.¹⁵⁶ Firearms dealers would still have the burden of verifying the certificate's authenticity, and states would still be under no obligation to keep records in a readily searchable database in order to facilitate verification; in fact, as seen with the NICS, states are sometimes reluctant to comply even when they are urged to supply records for a federal database.¹⁵⁷ Prospective gun buyers without insurance might not be able to afford the doctor's visit, and therefore, they would be denied their Second Amendment rights purely because of their economic status.¹⁵⁸ If Medicare or Medicaid covered the cost of the doctor's visit for those without adequate funds, then the already-strained federal budget would be put under even more stress.¹⁵⁹ Furthermore, the mental health certificate may rely on the opinion of a single doctor, which may not always be accurate.¹⁶⁰ Even if accurate, the practice of denying Second Amendment rights to those diagnosed as mentally ill would be constitutionally impermissible because those individuals would not have received due process of law before their rights were stripped.¹⁶¹ Essentially, there are too many problems with the mental health certificate idea for it to be a viable solution.¹⁶²

152. *Id.* at 56; McCreary, *supra* note 1, at 855.

153. *See* Unruh, *supra* note 3.

154. McCreary, *supra* note 1, at 855; Melter, *supra* note 10, at 56.

155. *See* McCreary, *supra* note 1, at 855–57.

156. *Id.* at 855.

157. *Id.* at 838, 856.

158. *See* U.S. CONST. amend. II; McCreary, *supra* note 1, at 838, 856.

159. *See* CONG. BUDGET OFFICE, THE IMPACT OF SOCIAL SECURITY AND MEDICARE ON THE FEDERAL BUDGET 1 (2002), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/39xx/doc3982/11-14-longrangebrief6.pdf>; McCreary, *supra* note 1, at 857.

160. *See* McCreary, *supra* note 1, at 827 (noting that Cho was released from a mental health facility after one doctor said that he was not a danger to himself or others).

161. *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012).

162. *E.g.*, McCreary, *supra* note 1, at 857.

Fortunately, the fact that many mass shooters had a documented mental illness means that they have yet another characteristic in common: Most of them sought—or were forced to undergo—treatment from a physician or psychiatrist.¹⁶³ Similarly, the treatments offered to these mass shooters were comparable in the sense that they were all antidepressant or antipsychotic medications.¹⁶⁴ For example: Laurie Dann, on Anafranil and Lithium, opened fire on seven children in 1988, killing one;¹⁶⁵ Patrick Purdy, prescribed Thorazine and Amitriptyline, killed five children and wounded thirty others with an AK-47 assault rifle in 1989;¹⁶⁶ that same year, Joseph T. Wesbecker gunned down twenty of his coworkers just a month after he began taking Prozac;¹⁶⁷ unnamed “prescription medications related to the treatment of psychological problems” were found in Seung-Hui Cho’s possession just after his shooting rampage at Virginia Tech left thirty-two dead;¹⁶⁸ finally, James Eagan Holmes was prescribed sertraline—a generic form of Zoloft—and Clonazepam shortly before he began stockpiling firearms and ammunition for his 2012 massacre in Aurora, Colorado;¹⁶⁹ and those are just to name a few. Thus, this pattern is a factor that cannot be ignored when trying to solve the mass shooting problem in America.¹⁷⁰

The availability of antipsychotics and antidepressants has been steadily increasing since the 1950s, with more than twenty types being introduced to the market since then.¹⁷¹ The number of Americans on antidepressants has doubled every ten years since the 1970s, and today, roughly ten percent of Americans are prescribed at least one of these drugs.¹⁷² There are four popular types of antidepressants: Tricyclics,

163. *Id.* at 825; Unruh, *supra* note 3; Jenny Deam, *James Holmes’ Psychiatrist Warned He May Pose Threat*, L.A. TIMES (Apr. 4, 2013), <http://articles.latimes.com/2013/apr/04/nation/la-na-james-holmes-documents-20130405>.

164. *See* Corsi, *supra* note 3; Unruh, *supra* note 3.

165. Unruh, *supra* note 3.

166. Robert Reinhold, *Killer Depicted as Loner Full of Hate*, N.Y. TIMES, Jan. 20, 1989, at A.8; Unruh, *supra* note 3.

167. Ronald Smothers, *Disturbed Past of Killer of 7 Is Unraveled*, N.Y. TIMES, Sept. 16, 1989, at 1.10; Unruh, *supra* note 3.

168. Corsi, *supra* note 3.

169. McCreary, *supra* note 1, at 823; Deam, *supra* note 163.

170. *See* Corsi, *supra* note 3. Approximately “[ninety] percent of school shoot[ers]” were prescribed these drugs. *Id.*

171. Bruce L. Saltz et al., *Recognizing and Managing Antipsychotic Drug Treatment Side Effects in the Elderly*, 14 PRIMARY CARE COMPANION J. CLINICAL PSYCHIATRY 14, 14 (Supp. 2 2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC487007/pdf/i1523-5998-6-52-14.pdf>.

172. Unruh, *supra* note 3; William Weir, *Hartford Firm’s Genetic Tests Help Identify Effective Antidepressants for Individual Patients*, COURANT (Dec. 29, 2011), http://articles.courant.com/2011-12-29/health/hc-hartford-hospital-depression-0102-20111229_1_antidepressants-dna-analysis-genomas.

monoamine oxidase inhibitors (“MAOIs”), selective serotonin reuptake inhibitors (“SSRIs”), and serotonin and norepinephrine reuptake inhibitors (“SNRIs”).¹⁷³ Popular SSRI brand names include Prozac, Paxil, Celexa, and Zoloft, whereas popular SNRIs are marketed under names such as Effexor and Cymbalta.¹⁷⁴ SSRIs and SNRIs are more popular than tricyclics and MAOIs because they are newer, and, in comparison, users may have a decreased risk of developing long-term involuntary movement disorders.¹⁷⁵ However, patients react to drugs differently and “no one-size-fits-all approach to medication exists.”¹⁷⁶

Doctors and patients have to conduct trial-and-error experiments with different psychoactive drugs and different dosages in order to “maximize relief while minimizing side effects.”¹⁷⁷ This is because antipsychotics and the four most popular categories of antidepressants are metabolized in the human body by two enzymes: Cytochromes P2D6 and P2C19 (“CYP2D6” and “CYP2C19”).¹⁷⁸ The body’s production of these enzymes determines how an individual will react to psychoactive medications.¹⁷⁹ Accordingly, if a patient’s body naturally produces high amounts of CYP2D6 or CYP2C19, then the patient will metabolize an antidepressant such as Prozac very quickly, the drug will only effect the patient minimally, and only for a short amount of time.¹⁸⁰ Conversely, if a patient’s body does not produce enough of these enzymes, then a normal dose of the psychoactive drug will cause the active ingredient to build up in the patient’s system.¹⁸¹ Such an accumulation of the drug in the human body causes serious side effects.¹⁸²

173. 117 AM. JUR. *Trials* § 1 (2010).

174. *Id.*

175. *Id.*; Jack J. Chen, *Drug-Induced Movement Disorders: A Primer*, U.S. PHARMACIST (Nov. 19, 2007), http://www.uspharmacist.com/content/c/10205/?+=alzheimer's_and_dementia,neurology.

176. *Trials*, *supra* note 173, § 1.

177. *Id.*

178. *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, CEPMED, <https://cepmmed.dnadirect.com/grc/patient-site/psychiatric-drug-response/index.html> (last visited Feb. 16, 2014); *see also Weir*, *supra* note 172.

179. *See Sara Hoffman Jurand, Lawsuits Over Antidepressants Claim the Drug Is Worse than the Disease*, TRIAL, Mar. 2003, at 14, 16–17; *see also M.J. Kuhar & A.R. Joyce, Is the Onset of Psychoactive Drug Effects Compatible with a Protein-Synthesis Mechanism?*, 28 NEUROPSYCHOPHARMACOLOGY 94, 94–95 (Supp. 2003), available at <http://www.nature.com/npp/journal/v28/n1s/pdf/1300140a.pdf>; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

180. *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

181. Jurand, *supra* note 179, at 16–17.

182. *Id.*

The side effects experienced by poor metabolizers can range anywhere from nausea and dizziness to aggression and violence.¹⁸³ Akathisia is a reported side effect of psychoactive drug use that is characterized by “a terrible inner sensation of agitation accompanied by a compulsion to move about.”¹⁸⁴ Patients experiencing akathisia often “describe it as wanting to ‘jump out of their skin.’”¹⁸⁵ This condition has been known to trigger violent behavior and drive patients to commit suicide and homicide.¹⁸⁶

Nevertheless, pharmaceutical manufacturers insist that akathisia is not a side effect at all: “[P]atients taking [antidepressants and antipsychotics] suffer from clinical depression—and . . . depressed people can be suicidal.”¹⁸⁷ However, doctors often prescribe these drugs for medical conditions other than depression, and with good reason.¹⁸⁸ Zoloft alone has been approved by the FDA as suitable for treating panic disorder, pediatric OCD, premenstrual dysphoric disorder, and social anxiety disorder, to name a few.¹⁸⁹ Patients who received psychoactive drugs as a treatment for ailments such as these, and showed no homicidal or suicidal behaviors prior to taking the medication, suddenly committed violent acts up to and including homicide.¹⁹⁰ For example, Vicky Jo Hartman received Zoloft from a family doctor despite the fact that “[s]he was not diagnosed with—or even evaluated for—clinical depression, anxiety attacks, or any other psychological disorder.”¹⁹¹ After a short period of taking the medication as directed, Vicky shot her husband and then committed suicide.¹⁹² Furthermore, in spite of the confident facade that pharmaceutical companies

183. John Alan Cohan, *Psychiatric Ethics and Emerging Issues of Psychopharmacology in the Treatment of Depression*, 20 J. CONTEMP. HEALTH L. & POL’Y 115, 122–23, 149 (2003); see Corsi, *supra* note 3; Unruh, *supra* note 3; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

184. Unruh, *supra* note 3.

185. Jurand, *supra* note 179, at 14.

186. *Id.*; Corsi, *supra* note 3; Unruh, *supra* note 3; see Geoffrey Ingersoll, *The Antipsychotic Prescribed to Adam Lanza Has a Troubled History All Its Own*, BUS. INSIDER (Dec. 18, 2012, 2:36 PM), <http://www.businessinsider.com/adam-lanza-taking-antipsychotic-fanapt-2012-12>.

187. Stephanie Francis Cahill, *Luvox Lawsuit: Columbine Survivor Claims Antidepressant Caused Gunman’s Actions*, A.B.A. J. Sept. 13, 2001, available at Westlaw, 1 No. 35 ABA J. E-Report 2; Jurand, *supra* note 179, at 14.

188. See Jurand, *supra* note 179, at 16.

189. Michael A. Rosenhouse, Annotation, *Liability of Prescription Drug Manufacturer for Drug User’s Suicide or Attempted Suicide*, 45 A.L.R. 6th 385, 402 (2009).

190. See *Estates of Tobin v. SmithKline Beecham Pharm.*, 164 F. Supp. 2d 1278, 1280, 1283–84 (D. Wyo. 2001); Jurand, *supra* note 179, at 14; Corsi, *supra* note 3.

191. Jurand, *supra* note 179, at 14.

192. *Id.*

put up—that the disease is to blame, not the drug—Solvay Pharmaceuticals settled with Columbine victims after it was alleged that Luvox caused Eric Harris’s high school rampage in 1999.¹⁹³ In another case, the manufacturer of Paxil was found liable in a wrongful death suit in excess of six million dollars after expert testimony revealed that some individuals experience severe reactions to SSRIs such as Paxil and Prozac, that the shooter was one such individual, and that his ingestion of Paxil caused his homicidal and suicidal behavior.¹⁹⁴ Instances such as these are evidence that homicidal and suicidal tendencies are not always a symptom of a pre-existing mental illness, but are sometimes a treatment-induced problem.¹⁹⁵

Despite the increasingly clear connection between psychoactive drug use and akathisia-related side effects, it was not until 2006 that the Food and Drug Administration (“FDA”) even considered requiring the warning labels to include these risks.¹⁹⁶ Still, the failure to adequately warn about suicidal and homicidal tendencies has been the main source of litigation against pharmaceutical companies in recent years.¹⁹⁷ Much of this litigation has proved to be unsuccessful for the plaintiffs for a few reasons.¹⁹⁸

According to Comment k in Section 402A of the Second Restatement of Torts, there are some products—such as antidepressants and antipsychotics—that are unavoidably unsafe.¹⁹⁹ Unavoidably unsafe products are those that have the potential to pose a serious risk to users even if the product is used as directed.²⁰⁰ Manufacturers of products that fall under the meaning of Comment k are generally exempted from strict liability in suits for injuries related to the use of the product.²⁰¹ Manufacturers are able to put unavoidably unsafe products—such as psychoactive medications—on the market as long as the medication is not unreasonably dangerous.²⁰² A product is only unreasonably dangerous when its benefits

193. Taylor v. Solvay Pharm. Inc., 223 F.R.D. 544, 549 (D. Colo. 2004); Cahill, *supra* note 187.

194. *Estates of Tobin*, 164 F. Supp. 2d at 1280, 1283–84, 1290.

195. Cahill, *supra* note 187; see Corsi, *supra* note 3.

196. *Trials*, *supra* note 173, § 5.

197. *Id.* §§ 1, 5; Cahill, *supra* note 187; Jurand, *supra* note 179, at 14.

198. Diane Schmauder Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R. 5TH 1, 26–27 (1998); Rosenhouse, *supra* note 189, at 396–97.

199. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965); *Trials*, *supra* note 173, § 10.

200. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k; *Trials*, *supra* note 173, § 10.

201. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k; *Trials*, *supra* note 173, § 10.

202. *Trials*, *supra* note 173, § 10.

fail to outweigh its risks.²⁰³ Since the medical utility of an antipsychotic or antidepressant is so great, pharmaceutical manufacturers are rarely held liable for putting an unavoidably unsafe product on the market.²⁰⁴ As such, they can usually only be held liable for injury resulting from use of their product when they failed to provide an adequate warning.²⁰⁵

In order to be sufficient, the warning label on psychoactive drug packaging “must: (1) indicate the scope of the danger, (2) communicate the extent or seriousness of the potential danger, (3) alert a reasonably prudent practitioner to the danger, and (4) be conveyed in a satisfactory manner.”²⁰⁶ The third adequate warning requirement brings up a problem known as the learned-intermediary doctrine (“LID”).²⁰⁷

The LID functions as a major obstacle to plaintiffs asserting a failure to warn claim against pharmaceutical manufacturers.²⁰⁸ Under the LID, a pharmaceutical manufacturer has no duty to warn a patient of possible side effects.²⁰⁹ Rather, the manufacturer is only obligated to warn the medical practitioners who will be prescribing the drug.²¹⁰ The LID applies to claims in strict liability and negligence, and it is used to break the chain of causation between the pharmaceutical manufacturer and the drug-induced violence of the patient.²¹¹ The rationale behind the LID is that the “physician is in the best position to evaluate the often complex information provided by the manufacturer concerning the risks and benefits of its drug . . . and to make an individualized medical judgment, based on the patient’s particular needs and susceptibilities, as to whether the patient should use the product.”²¹² In order to prove that a drug was not accompanied by a sufficient warning, a doctor, qualified as an expert, must testify that had a stronger warning been given, he would not have prescribed the drug to his patient.²¹³ This requirement almost always sets the plaintiff up for failure, and the reason why is clear when one considers the abovementioned information about CYP2D6 and CYP2C19.²¹⁴ Under the current scheme, doctors do not test a patient’s rate

203. *Id.*

204. *Id.*

205. *Id.*

206. Kane, *supra* note 198, at 29.

207. Rosenhouse, *supra* note 189, at 397.

208. Kane, *supra* note 198, at 26; Rosenhouse, *supra* note 189, at 397.

209. Kane, *supra* note 198, at 27; Rosenhouse, *supra* note 189, at 397.

210. Kane, *supra* note 198, at 27; Rosenhouse, *supra* note 189, at 397.

211. Rosenhouse, *supra* note 189, at 397.

212. Kane, *supra* note 198, at 26.

213. *Id.* at 30–31.

214. *See Trials*, *supra* note 173, § 16; Jurand, *supra* note 179, at 16–18; Kuhar & Joyce, *supra* note 179, at 94–95; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

of enzyme production prior to prescribing an antipsychotic or antidepressant.²¹⁵ They operate under the assumption that every patient's body has a normal level of CYP2D6 and CYP2C19 and will thus be capable of metabolizing the drugs properly.²¹⁶ Since violent akathisia-related side effects do not occur when a drug is metabolized properly, doctors are justified in prescribing a medication—regardless of the known possible side effects—because a patient with normal CYP2D6 and CYP2C19 levels is statistically unlikely to suffer them.²¹⁷ As such, physicians typically cannot testify that a stronger warning would have deterred them from prescribing a drug to a particular patient because it is not the content of the warning that has the most effect on their decision, but the probability that the warning's content will occur.²¹⁸

If a doctor *is* capable of providing the necessary testimony in a failure to warn claim, the plaintiff's next major obstacle is the pharmaceutical company's federal preemption defense.²¹⁹ Since the failure to warn is a state law cause of action, pharmaceutical companies are inclined to argue that "the federal regulatory scheme is so pervasive as to leave no room for supplementary state regulation, or state law conflicts with federal law, making compliance with both either impossible or frustrating to the purpose of the federal law."²²⁰ In cases such as these, the pharmaceutical companies insist that the FDA regulations create "both a floor and a ceiling for drug labeling" requirements.²²¹ Under this theory, which was the common understanding of FDA regulations until 2008, pharmaceutical companies were discouraged from strengthening their warnings above what was required for FDA compliance.²²² This was intended to reduce the risk of over-warning, because over-warning would "exaggerate [the drug's] risk[] . . . to avoid liability," which could "discourage [the] appropriate use of a beneficial drug" or "cause meaningful risk information to lose its significance."²²³

215. See Jurand, *supra* note 179, at 16–17 (noting that a test exists and implying that it is not used); Weir, *supra* note 172.

216. See Jurand, *supra* note 179, at 16; Weir, *supra* note 172; but see *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

217. Kuhar & Joyce, *supra* note 179, at 94–95; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

218. See *Trials*, *supra* note 173, § 16.

219. *Id.* § 4; Kane, *supra* note 198, at 31; Rosenhouse, *supra* note 189, at 400–01.

220. Kane, *supra* note 198, at 127.

221. Rosenhouse, *supra* note 189, at 401.

222. *Id.* at 396–97, 399, 401, 403.

223. *Id.* at 401.

However, some courts have noted that the federal regulations imposed by the FDA do not always preempt a state law cause of action against pharmaceutical manufacturers.²²⁴ One such case was *Tucker v. SmithKline Beecham Corp.*,²²⁵ which involved a wrongful death claim against the manufacturer of the antidepressant Paxil.²²⁶ In that case, the court analyzed the language of the federal statutes that govern changes to a psychoactive drug's warning label.²²⁷ The court noted that "the FDA regulations allow a manufacturer to modify pharmaceutical labels unilaterally and immediately, without prior FDA approval, when the manufacturer has reasonable evidence of a serious hazard."²²⁸

[T]he ongoing ability, authority, and responsibility to strengthen a label still rest squarely with the drug manufacturer. . . . [T]he FDA's power to disapprove does not make the manufacturer's voluntarily strengthened label a violation of federal law, which is what it would take to establish an actual conflict between state tort law and federal law.²²⁹

Many cases after *Tucker* have followed a similar line of reasoning, finding that a pharmaceutical manufacturer has the duty to revise its warning label as soon as a possible risk is brought to light.²³⁰ Rather, the manufacturer's duty to warn is dependent on the risks that it has reason to know about, and it is under a continuous obligation to notify prescribing physicians of any possible side effects that could possibly be related to the drug's use.²³¹ A causal relationship between the drug's use and the purported risk does not need to be established in order for the duty to warn to apply.²³²

Although a causal relationship need not be shown in order for the manufacturer to have the duty to warn, causation is a key element that plaintiffs need to prove at trial.²³³ The causation element is another large problem in failure to warn cases, because it requires the plaintiff to show that the suicide, homicide, or other event would not have occurred if the patient was not prescribed the medication.²³⁴ Since pharmaceutical manufacturers

224. *E.g.*, *Tucker v. SmithKline Beecham Corp.*, 596 F. Supp. 2d 1225, 1237–38 (S.D. Ind. 2008).

225. 596 F. Supp. 2d 1225 (S.D. Ind. 2008).

226. *Id.* at 1226–27.

227. *Id.* at 1227–29.

228. *Id.* at 1227.

229. *Id.* at 1229.

230. *Trials*, *supra* note 173, § 21.

231. *See id.*

232. *Id.* § 5.

233. *Id.* §§ 5, 16.

234. *Id.* § 16.

are typically the only party with access to information about a drug's ability to actually cause suicidal and homicidal behavior in patients, the plaintiff often has trouble establishing the required showing of causation.²³⁵

V. THE SOLUTION

In recent years, biomedical companies have been investing in pharmacogenetic studies, the results of which “offer[] the promise of ‘personalized medicine.’”²³⁶ Pharmacogenetics is the study of differences in drug metabolism and response due to differing levels of enzyme production.²³⁷ Pharmacogeneticists recognize that some individuals are chemically incompatible with—or poor metabolizers of—certain prescription drugs.²³⁸ As a result, pharmacogeneticists have developed a simple test, which allows a physician to determine the CYP2D6 and CYP2C19 levels in a patient's body.²³⁹ This *compatibility test* begins with a cheek swab, and after two days, a prescribing doctor is able to tell whether a patient will experience adverse side effects if prescribed a certain type of medication.²⁴⁰ According to pharmacogenetic researchers, “[t]he solution . . . is to assess enzyme activity and then prescribe medication compatible with that . . . activity.”²⁴¹ Accordingly, the compatibility test is intended to ensure that individuals suffering from psychosis, depression, anxiety, or other psychological disease will receive a medication that will work with their body chemistry.²⁴² Administering the test to patients prior to prescribing an antipsychotic or antidepressant will reduce the likelihood that a patient will experience violent, homicidal, and suicidal side effects.²⁴³

The proposal, then, is to require pharmaceutical companies to provide physicians and psychiatrists with the means necessary to conduct one of these tests for each patient who may need a psychoactive medication. If less people suffer from akathisia-related side effects, then there is a decreased likelihood that individuals will engage in mass shootings.²⁴⁴

235. See *Trials*, *supra* note 173, § 20.

236. Weir, *supra* note 172.

237. See *id.*

238. See *id.*

239. Jurand, *supra* note 179, at 16–17; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

240. Weir, *supra* note 172.

241. *Id.*

242. See Jurand, *supra* note 179, at 16–17; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

243. See Jurand, *supra* note 179, at 16–17; Weir, *supra* note 172; *What is CYP2D6 and CYP2C19 Testing for Psychiatric Drug Response?*, *supra* note 178.

244. See *supra* Part IV.

The financial burden of providing the compatibility tests should not fall squarely on the doctors or medical facilities for a few reasons. First, medical facilities such as hospitals, doctors' offices, mental institutions, and psychiatrists' offices are under a huge financial burden as it is.²⁴⁵ Their budgets should not be put under additional stress, especially because requiring them to foot the bill for the compatibility test could have a negative impact on patient treatment: If the medical institution is required to foot the bill for the compatibility test, then doctors may be convinced to avoid prescribing psychoactive drugs in order to save the facility money. This would be an undesired effect, as it may result in patients not receiving the treatment they need. Putting the cost of providing the test on the prescribing physician or the medical facility could also cause doctors to continue prescribing psychoactive drugs, but simply not administer the test in an effort to save money. If akathisia-related side effects in the patient occurred thereafter, then the doctor could lose his or her license and be held civilly liable to the patient.²⁴⁶ This would be yet another undesired effect. Instead, putting the cost of the compatibility tests on the pharmaceutical manufacturers easily avoids these issues.

Second, it is a standard principle of tort law that the duty to warn falls on the party with the most information available about the product, which is the manufacturer.²⁴⁷ The compatibility test is no more than a tool that establishes a personalized warning for each patient by providing the statistical likelihood of adverse side effects on the user.²⁴⁸ Therefore, the duty of providing the test or warning should fall on the manufacturer.²⁴⁹ Third, this proposal complies with FDA regulations regarding manufacturer-supplied warnings, because there is no federal law explicitly prohibiting pharmaceutical companies from providing the statistical likelihood that an individual patient will experience side effects.²⁵⁰

Finally, this proposal serves as a way around the often-troubling LID: If pharmaceutical companies were required to provide compatibility tests to medical practitioners in order to satisfy the adequate warning requirement and they failed to do so, then doctors could testify that they

245. Parija Kavilanz, *Doctors Driven to Bankruptcy*, CNN MONEY (Apr. 8, 2013, 11:20 AM), <http://www.money.cnn.com/2013/04/08/smallbusiness/doctors-bankruptcy/>.

246. See *Trials*, *supra* note 173, § 20; Peter Eisler & Barbara Hansen, *Six Types of Misconduct that Get Doctors in Trouble*, USA TODAY (Aug. 21, 2013, 1:29 PM), <http://www.usatoday.com/story/news/nation/2013/08/20/troubled-doctors-misconduct-findings/2678511/>.

247. Rosenhouse, *supra* note 189, at 405.

248. See Weir, *supra* note 172.

249. See Rosenhouse, *supra* note 189, at 405.

250. *Id.* at 396–97.

would not have prescribed the drug if they knew that the patient was a poor metabolizer. Currently, doctors, patients, and shooting victims bear the risk of loss for injury when akathisia-related side effects occur.²⁵¹ This proposal places the risk of loss onto pharmaceutical manufacturers instead because they are in a better position to financially handle “the loss by distributing it as a cost of doing business.”²⁵² Ultimately, this proposal opens the door for pharmaceutical company liability.

VI. CONCLUSION

Mass shootings in America are not going to be stopped by simple gun regulations.²⁵³ The failures of previous gun laws and the sheer number of mass shootings that occurred during America’s strictest gun control eras should testify to that point.²⁵⁴ Government-sponsored gun buy-backs, future gun bans, and mental health certificates are not viable solutions either because of their inherent unconstitutionality and impracticability.²⁵⁵ When it comes to mass shootings, gun restrictions are analogous to treating a symptom; it is never going to cure the disease because it does not target the root cause.²⁵⁶ Instead, if Americans wish to find a solution to the mass-shooting problem, they need to focus on targeting the source of mass shooters’ suicidal and homicidal proclivities.²⁵⁷ One such source is akathisia as a result of psychoactive drug use.²⁵⁸ Accordingly, the best way to reduce the likelihood of mass shootings is to reduce the likelihood that patients will suffer from akathisia after taking a prescription medication.²⁵⁹ One way to help ensure that this side effect will not occur is by conducting a simple compatibility test to determine the patients’ ability to metabolize psychoactive drugs.²⁶⁰ The compatibility test requirement also makes the pharmaceutical companies vulnerable to civil suit.²⁶¹

The doors for pharmaceutical company liability need to be opened when it is discovered that a mass shooter was using that company’s drug, and rightly so. If it is discovered that an antipsychotic or antidepressant was being used by a mass shooter at the time of the massacre in question, then

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251. *See supra* Part IV.
 252. *Trials, supra* note 173, § 20.
 253. *See supra* Parts II–III.
 254. *Id.*
 255. *See supra* Parts II–IV.
 256. *See supra* Part III.
 257. *See supra* Part IV.
 258. *Id.*
 259. *Id.*
 260. *See supra* Part V.
 261. *Id.*

pharmaceutical companies should bear some risk of liability. This will undoubtedly help the survivors and the families of the deceased. Typically, these individuals cannot recover from the shooter because he is either dead—shot by the police or committed suicide at the scene—or because he is not financially capable of adequately compensating his victims. The victims cannot recover from gun manufacturers under the current regulatory scheme because they are immune from suit in these circumstances.²⁶² Survivors and the families of the deceased cannot recover from the owner of the shooting's location because they would have to prove that the owner knew or should have known that this venue would be the place of an attack and he failed to hire security accordingly, which oftentimes requires a previous, similar violent instance at that location.²⁶³ Opening liability on the pharmaceutical companies gives the victims a chance to recover damages, have their medical expenses covered, or have their loved ones' funeral service paid for. It will also help because it will encourage the pharmaceutical companies to independently—on their own time and dime—work toward reducing the likelihood of their product causing a violent event.

Aside from lifting the burden off of the gun industry, saving money on ineffectual gun legislation attempts, helping to reduce the mass shooting problem, and assisting victims in their struggle to recover, this solution also secures the rights of those suffering from mental illness. With the compatibility test administered, these individuals do not have to suffer through a *trial-and-error* method of treatment; it is likely that they will get the most effective medication for their ailment the very first try—the best possible treatment for their illness—thus securing their right to comprehensive mental health care. Further, this solution will assist in securing the Second Amendment rights of all American citizens—regardless of their health—because it does not impose additional disqualifiers for firearm ownership, nor does it mandate additional certifications or checks.

262. See Katrina vanden Heuvel, *The Case for Gun Liability Laws*, NATION (Sept. 24, 2013, 9:42 AM), <http://www.thenation.com/blog/176317/case-gun-liability-laws#>.

263. Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 WHITTIER L. REV. 409, 409–10 (2006).

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