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# PUTTING A BAND-AID ON A BULLET WOUND: WHY GUN LEGISLATION TARGETING INDIVIDUALS WITH MENTAL ILLNESS ISN'T WORKING

LINDSAY BRAMBLE\*

## I. INTRODUCTION

On May 26, 2014, twenty-two-year-old Elliot Rodger killed six people in Isla Vista, California before killing himself, using legally-purchased firearms.<sup>1</sup> Rodger's parents had been concerned about his mental health since he was only eight-years-old, noticing that their son was lonely and withdrawn.<sup>2</sup> Just one month prior to the shooting, Rodger's mother, concerned after seeing some of his YouTube videos where he explained his desire to harm others, contacted mental-health officials.<sup>3</sup> The mental health officials contacted sheriff's deputies who arrived at Rodger's apartment but determined that Rodger was "quiet and timid" and "polite and courteous."<sup>4</sup> Despite his parents' attempts to help their son, Rodger

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

2. *Id.*

3. Philip Rucker & Robert Costa, *In Elliot Rodger, Authorities in Calif. Saw Warning Signs But Didn't See A Tipping Point*, WASH. POST (May. 25, 2014), [http://www.washingtonpost.com/national/sheriff-calif-shooter-rodger-flew-under-the-radar-when-deputies-visited-him-in-april/2014/05/25/88123026-e3b4-11e3-8dcc-d6b7fede081a\\_story.html](http://www.washingtonpost.com/national/sheriff-calif-shooter-rodger-flew-under-the-radar-when-deputies-visited-him-in-april/2014/05/25/88123026-e3b4-11e3-8dcc-d6b7fede081a_story.html).

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

continued to suffer from severe mental health problems before carrying out his attack.<sup>5</sup>

In September 2013, Aaron Alexis, a subcontractor who previously worked at the Washington D.C. Navy Yard, entered the Navy Yard and killed twelve people.<sup>6</sup> He used a firearm that he legally purchased just a week before the shooting, after passing a federal background check in Virginia.<sup>7</sup> A month before the shooting, Alexis told both police and his supervisors that he was hearing voices and being followed.<sup>8</sup> Concerned, his supervisors took him off of his current job but he returned to the Navy Yard one month later.<sup>9</sup>

In December 2012, Adam Lanza, a twenty-year-old male who was described as a socially awkward, yet intelligent loner, killed twenty first-graders and six adults at Sandy Hook Elementary School in Connecticut.<sup>10</sup> Lanza reportedly suffered from Asperger's Syndrome, though this likely did not cause him to become violent.<sup>11</sup> The shooting at Sandy Hook was one of the deadliest mass murders in history.<sup>12</sup>

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5. See Nagourney et al., *supra* note 1 (explaining that Rodger's parents "ferried him from counselor to therapist" and "urged him to take antipsychotic medication"). See also THE MANIFESTO OF ELLIOT RODGER, available at <http://www.nytimes.com/interactive/2014/05/25/us/shooting-document.html> (last visited June 15, 2014) (a manifesto written by Rodger where he details the "suffering" he felt throughout his entire life and his plan for "retribution").

6. Courtland Milloy, *Navy Yard Shooting Underscores How Mental Illness Can Be Misdiagnosed Among Black Men*, WASH. POST (Sept. 24, 2013), [http://articles.washingtonpost.com/2013-09-24/local/42352825\\_1\\_mental-illness-males-navy-yard](http://articles.washingtonpost.com/2013-09-24/local/42352825_1_mental-illness-males-navy-yard).

7. Michael S. Schmidt, *State Law Prevented Sale of Assault Rifle to Suspect Last Week, Officials Say*, N.Y. TIMES (Sept. 17, 2013), [http://www.nytimes.com/2013/09/18/us/state-law-stopped-gunman-from-buying-rifle-officials-say.html?\\_r=0](http://www.nytimes.com/2013/09/18/us/state-law-stopped-gunman-from-buying-rifle-officials-say.html?_r=0).

8. Dion Nissebaum, *Navy Yard Shooting: New Details on Aaron Alexis' Mental State*, WALL ST. J. (Mar. 19, 2014, 11:06 AM), <http://blogs.wsj.com/washwire/2014/03/19/navy-yard-shooting-new-details-on-aaron-alexis-mental-state/>.

9. *Id.*

10. Richard A. Friedman, *In Gun Debate, a Misguided Focus on Mental Illness*, N.Y. TIMES (Dec. 17, 2012), [http://www.nytimes.com/2012/12/18/health/a-misguided-focus-on-mental-illness-in-gun-control-debate.html?\\_r=0](http://www.nytimes.com/2012/12/18/health/a-misguided-focus-on-mental-illness-in-gun-control-debate.html?_r=0); Matt Flegenheimer, *Final Report on Sandy Hook Killings Sheds New Light on Gunman's Isolation*, N.Y. TIMES (Dec. 27, 2013), <http://www.nytimes.com/2013/12/28/nyregion/with-release-of-final-sandy-hook-shooting-report-investigation-is-said-to-be-over.html?pagewanted=1>.

11. See Flegenheimer, *supra* note 9 (noting that Lanza's father gave authorities documents regarding his son's illness); Michael Luo & Mike McIntire, *When the Right to Bear Arms Includes the Mentally Ill*, N.Y. TIMES (Dec. 21, 2013), <http://www.nytimes.com/2013/12/22/us/when-the-right-to-bear-arms-includes-the-mentally-ill.html> (stating that most individuals with mental illness are not violent); David Wood, *Youth Mental Health Services Often Neglected For Many Teens*, HUFFINGTON POST (Dec. 18, 2012, 1:52 PM), [http://www.huffingtonpost.com/2012/12/18/youth-mental-health-services-sandy-hook\\_n\\_2322801.html](http://www.huffingtonpost.com/2012/12/18/youth-mental-health-services-sandy-hook_n_2322801.html) (noting that experts have said there is no link between Asperger's and violent behavior).

12. See *25 Deadliest Mass Shootings in U.S. History Fast Facts*, CNN, <http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/> (last updated Oct. 26, 2013, 6:10 PM). In total, twenty-eight people were killed, including the shooter and his mother. *Id.*

In July 2012, James Holmes, who was under the treatment of mental health professionals, killed twelve people in a movie theater in Aurora, Colorado.<sup>13</sup> Though it is unclear what he discussed with the mental health professionals, Dr. Lynn Fenton, a psychiatrist at the University of Colorado, reportedly warned campus police about Holmes one month prior to the shooting.<sup>14</sup> Still, he was able to purchase his weapons legally from licensed firearms dealers.<sup>15</sup> Holmes is currently on trial and has pleaded not guilty by reason of insanity.<sup>16</sup>

Due to the overwhelming number of devastating mass shootings such as those mentioned above, gun control legislation is at the forefront of discussion in our nation. To the public eye, the story is generally the same: a deranged, disillusioned, loner-type individual becomes violent and decides to attack.<sup>17</sup> For this reason, much of the population, both policymakers and the general public, is focused on trying to keep firearms out of the hands of the mentally ill.<sup>18</sup> However, due to gun control bills failing in the Senate, and continued mass shootings, the discussion is beginning to change.<sup>19</sup> A Gallup Poll from September 2013 shows

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From the year 1965 to present-day, only the mass shooting at Virginia Tech in Blacksburg, Virginia claimed more lives than that at Sandy Hook; thirty-two were killed. *Id.*

13. Keith Coffman, *James Holmes, Accused Colorado Gunman, Saw 3 Mental Health Experts Prior To Deadly Shooting*, HUFFINGTON POST, [http://www.huffingtonpost.com/2012/08/21/james-holmes-mental-health-colorado\\_n\\_1820450.html](http://www.huffingtonpost.com/2012/08/21/james-holmes-mental-health-colorado_n_1820450.html) (last updated Aug. 22, 2012, 11:52 AM).

14. Dan Elliot & Nicholas Riccardi, *Dr. Lynne Fenton, James Holmes' Psychiatrist, Warned Campus Police Of Threat A Month Before Theater Shooting*, HUFFINGTON POST (Apr. 4, 2013, 9:36 AM), [http://www.huffingtonpost.com/2013/04/04/district-judge-carlos-samour-james-holmes-arrest-documents-released-unsealed\\_n\\_3017933.html](http://www.huffingtonpost.com/2013/04/04/district-judge-carlos-samour-james-holmes-arrest-documents-released-unsealed_n_3017933.html).

15. Jana R. McCreary, "Mentally Defective" Language in the Gun Control Act, 45 CONN. L. REV. 813, 819, 823–24 (2013) [hereinafter McCreary, *Language*].

16. See John Ingold, *James Holmes' Insanity Case Poised to Become a "Battle of the Experts"*, DENVER POST (Feb. 24, 2014, 12:01 AM), [http://www.denverpost.com/news/ci\\_25214063/james-holmes-insanity-case-poised-become-battle-experts](http://www.denverpost.com/news/ci_25214063/james-holmes-insanity-case-poised-become-battle-experts).

17. See Friedman, *supra* note 9 (explaining how after mass shootings, "armchair diagnosticians" are always quick to claim that keeping guns from those with mental illness will solve homicides caused by firearms).

18. See *id.* (quoting Representative Mike Rogers, Republican of Michigan and a former F.B.I. agent, stating that "[w]hat the more realistic discussion is, [h]ow do we target people with mental illness who use firearms") (internal quotation marks omitted).

19. See Ashley Killough, *Mental Health Pushed In Congress Before Newtown Anniversary*, CNN (Dec. 12, 2013, 12:17 PM), <http://politicalticker.blogs.cnn.com/2013/12/12/mental-health-pushed-in-congress-before-newtown-anniversary/>; Matt Vasilogambros, *As Mass Shootings Continue, Americans Divided on their Cause*, NAT'L J. (Sept. 20, 2013), <http://www.nationaljournal.com/congress/as-mass-shootings-continue-americans-divided-on-their-cause-20130920>. There have been other mass shootings in recent history other than those already mentioned: on January 8, 2011, Jared Loughner opened fire in Tuscon, Arizona, killing six people and seriously injuring then-Representative Gabby Giffords; on September 27, 2012, Andrew Engeldinger killed five people and himself in Minneapolis after losing his job; and on August 5, 2012, Army veteran Wade Michael Page shot and killed six Sikh temple members and himself in Oak Creek, Wisconsin. *Mass Shootings in America: A History, 1999 through 2013*, N.Y. DAILY NEWS (Sept. 16, 2013, 1:52 PM), <http://www.nydailynews.com/news/national/mass-shootings-central-american-history-article-1.1457514>.

that more Americans are blaming the mental health system for mass shootings and support for stricter gun laws is beginning to decrease.<sup>20</sup>

This shifting focus from gun control to the mental health system is both warranted and justifiable for multiple reasons. Firstly, current federal gun control laws relating to mental health are not very successful because states are not required to report mental health information to the agencies that perform background checks, and there is also no standard on what information is to be reported.<sup>21</sup> Secondly, and more importantly, studies repeatedly show that individuals with mental health issues are not more violent than other individuals.<sup>22</sup> In fact, only four percent of violence in the United States is attributed to those with mental illness and individuals with mental illness are actually far more likely to be victims of violence.<sup>23</sup> Thus, focusing gun legislation on people with mental illness displaces the threat of violence to a group of individuals most of whom will never become violent.<sup>24</sup>

Mental health only dominates the headlines when a mass shooting occurs, and even then it is hidden behind gun control legislation.<sup>25</sup> What we rarely see in the headlines is that 75 million American families are touched by mental illness that threatens to tear apart lives every day.<sup>26</sup> In an interview with Sanjay Gupta entitled “My Son is Mentally Ill, So Listen Up,” Stephanie Escamilla, the mother of a fourteen-year-old boy suffering from bipolar disorder with psychosis, explains her side of the story.<sup>27</sup> She describes how her son has been hearing voices since he was ten: voices that tell him to kill his mother, his brother, and himself.<sup>28</sup> At first, no one believed her, not her family or friends, and when she would reach out to

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20. Lydia Saad, *Americans Fault Mental Health System Most for Gun Violence*, GALLUP (Sept. 20, 2013), <http://www.gallup.com/poll/164507/americans-fault-mental-health-system-gun-violence.aspx>.

21. See Killough, *supra* note 18; Morgan Stanley, Comment, Gun Control Is Not Enough: The Need to Address Mental Illness to Prevent Incidences of Mass Public Violence, 15 SCHOLAR 875, 882–84, 907 (2013).

22. See Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121, 122–23 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525086/>.

23. Thomas Insel, *Director's Blog: Understanding Severe Mental Illness*, NAT'L INST. OF MENTAL HEALTH (Jan. 11, 2011), <http://www.nimh.nih.gov/about/director/2011/understanding-severe-mental-illness.shtml>; Stuart, *supra* note 21 at 122–23.

24. See Friedman, *supra* note 9 (explaining that the majority of violence in this country is not caused by individuals with mental health issues).

25. See Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN, <http://www.cnn.com/2013/04/17/politics/senate-guns-vote/> (last updated Apr. 18, 2013, 11:02 AM) (explaining that despite support, the Mental Health Awareness and Improvement Act (S. 689), which called for expansion of programs for teachers and school-aged children to improve the awareness, prevention, and early diagnosis of mental illnesses through expanded federal funding, was defeated in Congress because it was attached to a bill regarding firearm regulation).

26. Wayne Drash, *'My Son is Mentally Ill' So Listen Up*, CNN, <http://www.cnn.com/interactive/2013/12/health/mentally-ill-son/> (last visited Apr. 20, 2014).

27. *Id.*

28. *Id.*

psychiatric hospitals for help she was repeatedly told the same thing: they cannot do anything for her unless her son is a “danger to himself or others.”<sup>29</sup> There were times, she admits, that she thought she hated her own son, although she eventually realized it was not her son she hated, but his disorder.<sup>30</sup> Four years and twenty hospitalizations later, he now has a diagnosis and Ms. Escamilla’s family finally accepted the truth, but the struggle is still there.<sup>31</sup>

Ms. Escamilla describes instances where her son would act out, either by shoving items off of a table or stabbing himself with a pencil.<sup>32</sup> She wanted to know why her son was acting this way, and his answer is staggering: his hallucinations had been telling him to hurt his brother, and acting out and harming himself was his way to deflect those thoughts.<sup>33</sup> He explains that he hates his mental illness and that he hopes to grow out of it.<sup>34</sup> Though he has learned to know when he is about to have an episode and can attempt to control it by letting out his anxiety and anger in other manners, like running around the neighborhood, he is still tormented by his thoughts.<sup>35</sup>

Ms. Escamilla and her son’s story paints a portrait of an individual suffering from mental illness that we do not see enough; an individual who hates his disease and wants to control it. He is lucky enough to have a mother who never gave up on him although she often had little to no support from family, friends, law enforcement, medical professionals, the media, and the public. The view on individuals with mental health issues needs to change in this country and it can start with law and policymakers. These individuals do not need to be targeted and ostracized, they need support.

This article will argue that gun control legislation aimed at individuals with mental health issues is both unwarranted and ineffective.<sup>36</sup> Our focus as a nation should first and foremost be on increasing funding and public awareness of mental health issues ensuring that at-risk individuals receive both the treatment and support necessary.<sup>37</sup> Only then will we have a hope at decreasing violence resulting from mass shootings and only then will gun legislation aimed at the mentally ill become workable and enforceable.<sup>38</sup>

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29. *Id.*

30. *Id.*

31. *See id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See infra* Parts III–IV (analyzing gun control laws aimed at those with mental illness and suggesting solutions).

37. *See infra* Part IV (arguing that our focus should be on mental health treatment rather than firearm regulations).

38. *See infra* Part IV (arguing that mental health treatment is the only way to prevent violence caused by individuals with mental illness).

In the first part of this article, I explain the history of both federal and state laws involving gun regulations, specifically those targeting individuals with mental health issues.<sup>39</sup> Next I analyze these laws and explain why they are unworkable as of now, highlighting misinformation about the mentally ill and discrepancies between state and federal laws.<sup>40</sup> Lastly, I propose realistic solutions to the prevention of mass violence through a focus on mental health treatment.<sup>41</sup>

## II. HISTORY OF GUN CONTROL LEGISLATION AS IT RELATES TO MENTAL HEALTH

### A. Federal Gun Control Laws

#### 1. *The Gun Control Act of 1968, the Brady Bill, and the NICS Improvement Act*

Prohibiting individuals with mental health issues from possessing firearms was first codified in the Gun Control Act of 1968.<sup>42</sup> This prohibition has been further enforced through the subsequent creation of the Brady Bill, the National Instant Criminal Background Check System (NICS) Improvement Act, and state laws.<sup>43</sup> Though each new law introduces new language and attempts to clarify who is prohibited from possessing firearms and how the law is to be enforced, this area of law is still very unclear.<sup>44</sup>

In response to the assassinations of Martin Luther King Jr. and Senator Robert Kennedy, Congress passed the Gun Control Act of 1968 with the goal of restricting certain at-risk groups from purchasing and possessing firearms.<sup>45</sup> The Act does this through two provisions, the first stating that “It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been *adjudicated as a*

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39. See *infra* Part II (discussing The Gun Control Act of 1968, the Brady Bill, the NICS Improvement Act, and corresponding state laws).

40. See *infra* Part III (explaining the ambiguous statutory language and the public’s misconceptions about mental health and violence).

41. See *infra* Part IV (arguing that treatment, rather than firearm restrictions, are the answer to stopping this sort of violence).

42. Jana R. McCreary, *Falling Between the Atkins and Heller Cracks: Intellectual Disabilities and Firearms*, 15 CHAP. L. REV. 271, 273 (2011) [hereinafter McCreary, *Falling*]; McCreary, *Language*, *supra* note 14, at 816–17; Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§921–928 and in scattered sections of 26 U.S.C. (2006)).

43. See McCreary, *Falling supra* note 42, at 278–79; see also Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2006)); NICS Improvement Amendment Act of 2007, Pub. L. No. 110-180, 121 Stat. 2550 (2008).

44. See McCreary, *Language, supra* note 14, at 818, 839–42.

45. McCreary, *Falling, supra* note 41, at 276; McCreary, *Language, supra* note 14, at 817–18.

*mental defective* or has been *committed to any mental institution*.”<sup>46</sup> The second provision states:

It shall be unlawful for any person . . . who has been *adjudicated as a mental defective* or who has been *committed to a mental institution* . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.<sup>47</sup>

This language, however, is extremely unclear and has meant very little in practice.<sup>48</sup> The Gun Control Act failed to define what it meant to be “a mental defective” and what entailed “commitment to a mental institution.”<sup>49</sup> This lack of clarity in the Act resulted in an inconsistent application of the rule among various courts and states.<sup>50</sup> For example, in *United States v. Hansel* the United States Court of Appeals for the Eighth Circuit found that “adjudicated as a mental defective” applies only to those with intellectual disabilities and not mental illness.<sup>51</sup> Similarly, the Fifth Circuit Court of Appeals found that a person with mental illness could be prohibited from possessing a firearm under these two provisions only if committed to a mental institution, meaning that having a mental illness alone or a mental illness in addition to a finding of dangerousness was not enough to prohibit possession of a firearm.<sup>52</sup> There were similar discrepancies surrounding the “commitment to a mental institution” language in regards to whether voluntary commitment sufficed, if the commitment had to be involuntary, if the reason for the commitment mattered, and if the length of the stay was relevant.<sup>53</sup>

Due to this confusion and inconsistent application, The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) provided definitions of the language in

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46. 18 U.S.C. § 922(d)(4) (2012) (emphasis added).

47. *Id.* § 922(g)(4)(2012) (emphasis added).

48. See McCreary, *Language*, *supra* note 14, at 833 (explaining that under these provisions, a seller of firearms was able to take a purchaser at his word).

49. See *id.*

50. See *id.* at 840.

51. 474 F.2d 1120, 1121, 1124–25 (8th Cir. 1973).

52. See *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988) (holding that either a formal adjudication that a person suffers a mental defect, or a formal commitment is necessary to prohibit an individual from possessing a firearm on the basis of mental disability).

53. See *Hansel*, 474 F.2d at 1122–23 (finding that the defendant was only held for “observation” and thus was not “committed” for purposes of the Gun Control Act); see *United States v. Vertz*, 40 Fed. Appx. 69, 71, 74, 75 (2002) (finding that the defendant had been “committed” although the court order had been for a “90 day alternative treatment plan” rather than a court-ordered commitment); see also McCreary, *Language*, *supra* note 14, at 849–52.



the Code of Federal Regulation (C.F.R.).<sup>54</sup> The ATF provides that “adjudicated as mental defective” means:

(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 others; or

(2) lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include-

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

(2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code Military Justice.<sup>55</sup>

The ATF provides that “commitment to a mental institution” means: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority.<sup>56</sup> This does not include voluntary commitment.<sup>57</sup> It does, however, include involuntary commitment for mental defectiveness or mental illness.<sup>58</sup> The term also includes commitments for reasons unrelated to mental illness, like drug use.<sup>59</sup> But an individual who is in an institution for observation only is not included.<sup>60</sup>

Beyond the confusing language, the Gun Control Act contained another major flaw. The Act simply stated that one may not sell a firearm to a person in this particular group, but provided no means for determining whether the purchaser was a member of the group.<sup>61</sup> Thus, Congress created the Brady Bill in 1993,<sup>62</sup> which established a waiting period during which time the local chief law enforcement officers (CLEOs) were to conduct a background check of the purchaser and created

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54. 27 C.F.R. §478.11 (2013).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. 18 U.S.C. §§ 922(g)(4), (9) (2012); McCreary, *Language, supra* note 14, at 834–35 (discussing how under the Act, the prohibited purchaser could only be identified through self-reporting).

62. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2006)).

the NICS which would provide information to federal firearm licensees about persons not qualified to purchase a firearm.<sup>63</sup>

The Brady Bill, however, was also flawed in that it failed to provide an incentive for states to submit information relating to mental health records.<sup>64</sup> As of 2007, only twenty-two states provided any information on mental health records.<sup>65</sup> After the Virginia Tech shooting,<sup>66</sup> Congress attempted to improve the Brady Bill in passing the NICS Improvement Act based on recommendations by the Virginia Tech Review Panel to improve coordination between State and Federal authorities.<sup>67</sup> The NICS Improvement Act thus allowed federal funds to be withheld from states that failed to submit information to the NICS about individuals who were adjudicated as a mental defective.<sup>68</sup> Additionally, federal agencies were required to report information related to prohibited possessors to the Attorney General, who was charged with updating the NICS.<sup>69</sup>

The compliance deadline for the NICS Improvement Act was set for January 2011, but by February of that year, nine states had provided no information and seventeen others had submitted less than twenty-five names.<sup>70</sup>

## 2. Recent Developments

In the wake of recent mass shootings, particularly the Sandy Hook shooting, the government has taken measures to strengthen the law surrounding gun ownership.<sup>71</sup> In early 2013, President Obama issued twenty-five executive orders

63. 18 U.S.C. §§ 921–22 (2006).

64. See McCreary, *Language*, *supra* note 14, at 835–36.

65. *Id.* (citing Press Release, Fed. Bureau of Investigation, Response to Inquiries on the FBI's National Instant Criminal Background Check System (Apr. 19, 2007), available at <http://www.fbi.gov/news/pressrel/press-releases/response-to-inquiries-on-the-fbis-national-instant-criminal-background-check-system>).

66. The Virginia Tech shooting was the deadliest campus shooting in United States history. McCreary, *Language*, *supra* note 14 at 839. On April 16, 2007, Seung Hui Cho killed thirty-two students and faculty at Virginia Tech before turning the gun on himself. *Id.* at 824. Cho had previously been evaluated by a licensed clinical social worker who found him to be “mentally ill” and “an imminent danger to himself or others.” *Id.* at 826. After a hearing before a Virginia district court, the judge found Cho to “present danger to himself as a result of mental illness” but released him, recommending outpatient treatment. *Id.* at 827. Despite being adjudicated as having a mental defect, Cho began purchasing firearms in the Spring of 2007. *Id.* at 829.

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

68. 18 U.S.C. §§ 922 (g), (n) (listing individuals “adjudicated as a mental defective” as prohibited persons); *Id.* § 922 note (Requirements to Obtain Waiver).

69. *Id.* § 922 note (Transmittal of Records).

70. *Id.* § 922 note (Requirements to Obtain Waiver); Greg Bluestein, *Most U.S. States Don't Follow Mental Illness Gun Law*, HUFFINGTON POST (Feb. 17, 2011, 2:04 PM), [http://www.huffingtonpost.com/2011/02/17/few-states-follow-mental-\\_n\\_824738.html](http://www.huffingtonpost.com/2011/02/17/few-states-follow-mental-_n_824738.html).

71. See Ashley Parker, *Obama Announces Gun Control Actions*, N.Y. TIMES (Jan. 3, 2014, 2:27 PM), [http://thecaucus.blogs.nytimes.com/2014/01/03/obama-announces-gun-control-actions/?\\_r=0](http://thecaucus.blogs.nytimes.com/2014/01/03/obama-announces-gun-control-actions/?_r=0) (discussing two executive orders signed by President Obama designed to make it

relating to gun laws, some of which include information about mental illness in the NICS.<sup>72</sup> Most recently, the Department of Justice (DOJ) proposed to clarify that the term “committed to a mental institution” includes not only involuntarily inpatient commitments but also involuntarily *outpatient* commitments.<sup>73</sup>

Congressional efforts for stricter gun regulations were introduced in the Senate but were met with great resistance.<sup>74</sup> For example, the Safe Communities, Safe Schools Act of 2013 (S. 684) which called for background checks for every firearm sale, was defeated in the Senate.<sup>75</sup> Attached to this bill was the Mental Health Awareness and Improvement Act (S. 689), which called for expansion of programs for teachers and school-aged children to improve the awareness, prevention, and early diagnosis of mental illnesses through expanded federal funding.<sup>76</sup> Though this act gained much support in the Senate, it was only introduced as an amendment to the Safe Communities, Safe Schools Act and was therefore put on hold.<sup>77</sup> However, Vice President Joe Biden recently announced that \$100 million from the United States Department of Health and Human Services and the United States Department of Agriculture will be used for mental health funding, suggesting that the government is starting to place more focus on mental health.<sup>78</sup>

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“easier for states to provide information about people with mental illness” to NICS); Luo & McIntire *supra* note 10 (discussing how Indiana, Connecticut, New York, Maryland, and California amended their firearm laws in response to recent shootings).

72. Parker, *supra* note 71.

73. Brett LoGiurato, *It's Been A Year Since The Sandy Hook Shooting — And America Has Done Nothing To Stop The Next One*, BUS. INSIDER (Dec. 14, 2013), <http://www.businessinsider.com/sandy-hook-shooting-anniversary-newtown-congress-background-checks-2013-12>.

74. See Barrett & Cohen, *supra* note 24 (discussing the defeat of the Manchin-Toomey plan, which “would have expanded background checks to include private sales at gun shows and all Internet sales,” in the U.S. Senate).

75. *Id.*; Ramsey Cox, *Reid Tables Gun Control Bill After Defeat on Background Checks*, THE HILL (Apr. 18, 2013, 6:55PM), <http://thehill.com/blogs/floor-action/senate/294835-reid-tables-gun-control-bill-after-defeat-on-background-checks-amendment>; *Mental Health Awareness and Improvement Act (S. 689): Reauthorizing and Expanding Critical Behavioral Health Programs*, National Council for Behavioral Health, [http://www.thenationalcouncil.org/wp-content/uploads/2012/12/Mental\\_Health\\_Awareness\\_and\\_Improvement\\_Act\\_S689.pdf](http://www.thenationalcouncil.org/wp-content/uploads/2012/12/Mental_Health_Awareness_and_Improvement_Act_S689.pdf); Safe Communities, Safe Schools Act, S. 649, 113<sup>th</sup> Cong. (2013), available at <https://www.govtrack.us/congress/bills/113/s649#overview>.

76. See Barrett & Cohen, *supra* note 24; Cox, *supra* note 75; *Mental Health Awareness and Improvement Act (S. 689): Reauthorizing and Expanding Critical Behavioral Health Programs*, NAT'L COUNCIL FOR BEHAVIORAL HEALTH, [http://www.thenationalcouncil.org/wp-content/uploads/2012/12/Mental\\_Health\\_Awareness\\_and\\_Improvement\\_Act\\_S689.pdf](http://www.thenationalcouncil.org/wp-content/uploads/2012/12/Mental_Health_Awareness_and_Improvement_Act_S689.pdf) [hereinafter *Mental Health Awareness*].

77. See *Mental Health Awareness*, *supra* note 76; Cox, *supra* note 75.

78. See Jeff Mason & Roberta Rampton, *Biden Announces Mental Health Push On Eve Of Newtown Anniversary*, REUTERS (Dec. 10, 2013), <http://www.reuters.com/article/2013/12/10/us-usa-shooting-mentalhealth-idUSBRE9B90CU20131210>.

### B. *State Gun Control Laws*

In addition to participating in the NICS, states can create their own gun legislation as it relates to mental health. Most states, however, adopt some form of the federal law banning individuals who have been “involuntarily committed to a psychiatric facility” or adjudicated as mentally ill or incompetent from possessing firearms.<sup>79</sup> States, like the federal courts, do not all have the same prohibitions regarding these individuals.<sup>80</sup> For example, the Virginia code addressing mental health and gun ownership prohibits possession of a firearm only as related to commitment or orders for treatments with no prohibition for a finding of dangerousness.<sup>81</sup> Thus, an individual found by a judge in Virginia to “present an imminent danger to himself” as a result of mental illness would not disqualify that person from purchasing a firearm.<sup>82</sup> Texas, like Virginia, does not have a provision regarding dangerousness.<sup>83</sup>

In recent years, some states have attempted to clarify and strengthen firearm regulations as they relate to mental health.<sup>84</sup> For example, the New York Safe Act of 2013<sup>85</sup> puts a burden on mental health professionals to report a patient to county governments if they believe the individual is “likely to engage in conduct that would result in serious harm to self or others.”<sup>86</sup> In California, a person placed on a seventy-two-hour psychiatric hold in a facility cannot purchase firearms for five years after they were admitted.<sup>87</sup> In Georgia and Mississippi, gun restrictions apply not only to those involuntarily committed to a mental health facility, but also to

79. Luo & McIntire, *supra* note 10.

80. See McCreary, *Language*, *supra* note 14, at 847.

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

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

82. See McCreary, *Language*, *supra* note 14, at 847.

83. TEX. GOV'T CODE ANN. § 411.052(a)(1-5) (West).

84. See, e.g., CAL. WELF. & INST. CODE § 8100(a) (West 2014) (restricting individuals who consented to inpatient treatment from receiving firearms); GA. CODE ANN. § 16-11-129(b)(1)(J) (2011) (restricting individuals who were voluntarily committed from purchasing firearms); MISS. CODE ANN. § 45-9-101 (2013) (restricting individuals who were voluntarily committed from purchasing firearms); S. 2230, 2013 N.Y. S. Assemb. (N.Y. 2013), *available at* [http://assembly.state.ny.us/leg/?default\\_fld&bn=S02230&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld&bn=S02230&Summary=Y&Text=Y) (putting the burden on mental health professionals to report dangerous individuals). See also Elizabeth Flock, *Gun Control Debate Clouds Definition of Mentally Ill*, U.S. NEWS (Apr. 3, 2013), <http://www.usnews.com/news/articles/2013/04/03/-gun-control-debate-clouds-definition-of-mentally-ill> (discussing the changes that California, New York, Mississippi, and Georgia have made to firearms regulations).

85. S. 2230, 2013 N.Y. S. Assemb. (N.Y. 2013), *available at* [http://assembly.state.ny.us/leg/?default\\_fld&bn=S02230&Summary=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld&bn=S02230&Summary=Y&Text=Y).

86. *Id.*

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

those who voluntarily committed themselves.<sup>88</sup> However, gun control groups disagree on which state measures, if any, are the most effective.<sup>89</sup>

Although most states have not taken any steps beyond that of the federal government, in 2013, Maryland tightened its gun restrictions.<sup>90</sup> In May 2013, Maryland Governor Martin O'Malley signed into law the Firearms Safety Act of 2013,<sup>91</sup> which bars anyone with a mental disorder who has a history of violence, or anyone who has been confined for more than thirty days to a mental facility for the treatment of a mental disorder, from having firearms.<sup>92</sup>

Prior to enacting these tightened gun regulations, the 2012 Maryland General Assembly created a Task Force to study the access of individuals with mental illness to regulated firearms.<sup>93</sup> The Task Force's report, published on January 2, 2013, focused heavily on the connection between mental illness and violence, finding that mental illness alone is not a compelling reason to permanently restrict access to firearms.<sup>94</sup> The Task Force recommended that (1) additional research be conducted on the correlation between mental illness and violence, (2) mental health professionals, educators, case workers etc. be required to report verbal or physical actions threatening suicide or threatening behavior, (3) local law enforcement be required to investigate any reported threats of violence, (4) law enforcement and health professionals should receive training on firearms and mental illness and the current state of the law on these issues, and (5) a formal process should exist for individuals prohibited from possessing or purchasing firearms to petition to have their rights restored.<sup>95</sup> The report of the Task Force is a promising step towards successfully addressing gun violence as it relates to mental health in Maryland.

Although not directly related to gun ownership, the Virginia State Senate recently passed legislation aimed at improving mental health treatment.<sup>96</sup> State Senator Creigh Deeds introduced the legislation following the death of his twenty-

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88. GA. CODE ANN. § 16-11-129(b)(1)(J); MISS. CODE ANN. § 45-9-101 (2013).

89. See Flock, *supra* note 84.

90. See Carrie Wells & Erin Cox, *Advocates Remember Victims On Anniversary Of Sandy Hook Tragedy*, BALT. SUN (Dec. 14, 2013), [http://articles.baltimoresun.com/2013-12-14/news/bs-md-newtown-anniversary-guns-20131214\\_1\\_gun-sense-gun-violence-gun-control](http://articles.baltimoresun.com/2013-12-14/news/bs-md-newtown-anniversary-guns-20131214_1_gun-sense-gun-violence-gun-control); 2013 Md. Laws, available at <http://mgaleg.maryland.gov/2013RS/bills/sb/sb0281E.pdf>.

91. MD. CODE ANN., Pub. Safety § 5-133.

92. *Id.* § 5-133(b)(9).

93. H.B. 618, 2012 Gen. Assemb., Reg. Sess. (Md. 2012).

94. Patrick Dooley & Capt. Jack McCauley, Report of the Task Force to Study Access of Mentally Ill Individuals to Regulated Firearms 4, 9 (2013).

95. *Id.* at 9–14.

96. SB 260, 2014 Sess. (Va. 2014), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?141+ful+SB260S3+pdf>; Michael Sluss, *Senate Passes Mental Health Bill*, ROANOKE TIMES (Feb. 10, 2014, 11:54 PM), [http://www.roanoke.com/news/article\\_8f620806-92d8-11e3-a653-0017a43b2370.html](http://www.roanoke.com/news/article_8f620806-92d8-11e3-a653-0017a43b2370.html).

four-year-old son.<sup>97</sup> His son had been released from an emergency custody order where he received a mental health evaluation the day before he stabbed his father and took his own life.<sup>98</sup> The legislation extends the amount of time a person can be held under an emergency custody order and establishes a psychiatric bed registry to ensure individuals suffering from mental health issues can receive the treatment they need.<sup>99</sup> Both the Maryland Task Force's report and this new Virginia legislation are promising first steps in addressing the shortcomings relating to mental health treatment in this country.

### III. WHY GUN LAWS INVOLVING MENTAL HEALTH HAVE BEEN LARGELY INEFFECTIVE

#### A. *Ambiguous Statutory Language*

Despite the ATF's attempt to clarify the language in the Gun Control Act, courts, states, and administrative agencies still disagree on the meaning.<sup>100</sup> Additionally, mental health professionals maintain that the language is outdated, not clearly defined, and that usage of the term "mental defective" is offensive.<sup>101</sup> It is worth noting, however, that in writing the majority opinion in *District of Columbia v. Heller*,<sup>102</sup> Justice Scalia seemed to assert that these prohibitions are constitutional in stating that the "longstanding prohibitions on the possession of firearms by . . . the mentally ill" are "presumptively lawful regulatory measures."<sup>103</sup>

Still, even if the regulations are constitutional, the lack of clarity in the language makes both the federal and state laws impossible to enforce. The White House has said that "the federal background check system is the most effective way to assure that such individuals [those designated as mentally defective or committed to a mental institution] are not able to purchase a firearm from a licensed gun dealer,"<sup>104</sup> however, without a uniform and accepted definition of this language, states will continue to be unclear on who exactly they are required to

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97. *Id.*

98. *Id.*

99. *Id.*

100. See McCreary, *Language*, *supra* note 14, at 848; *supra* notes 79–95 and accompanying text (discussing state laws and their interpretation).

101. Flock, *supra* note 84 (discussing the debate over federal standards between gun rights advocates and mental health professionals).

102. 554 U.S. 570 (2008).

103. *Id.* at 626–27.

104. *Fact Sheet: Strengthening The Federal Background Check System To Keep Guns Out Of Potentially Dangerous Hands*, WHITE HOUSE, OFFICE OF THE PRESS SEC'Y (Jan. 3, 2014) <http://www.whitehouse.gov/the-press-office/2014/01/03/fact-sheet-strengthening-federal-background-check-system-keep-guns-out-p>.

report and will continue to disagree on the interpretation of the statutory language.<sup>105</sup>

The DOJ's proposal to clarify the statutory term "committed to a mental institution" is just the latest in a long series of attempts to make these statutory provisions workable.<sup>106</sup> As shown through the history of federal gun legislation, attempts to clarify the language has not made much of a difference in terms of states reporting names to the NICS.<sup>107</sup> The National Rifle Association (NRA) recently said that states need to do a better job of submitting names of individuals with mental illness to the NICS.<sup>108</sup> However, this is no easy task. Years of non-reporting despite changes in the law and tweaks to the language suggest that the lack of clarity in language may not be to blame after all; perhaps the issue lies instead in the lack of available treatment for individuals with mental health issues. If treatment is unavailable, the at-risk individuals will never be evaluated and thus will never be entered into the NICS no matter how clear or foggy the statutory language.

### B. *Misconceptions about Mental Health*

#### 1. *Not All Mental Disorders are the Same*

The lack of clarity in the language leads to another issue: who fits into these at-risk categories. As previously mentioned, the "mental defective" language in the Gun Control Act and following federal legislation has come under much scrutiny.<sup>109</sup> Although not every court or state has agreed, it is generally accepted that a person with mental illness falls into this category.<sup>110</sup> Likewise, most of the discussion in the past year regarding gun legislation, both state and federal, uses the term "mental illness."<sup>111</sup> However, the intent of the policymakers, the media, and the general public is unclear with their usage of this term; are they purposefully speaking about only mental health issues that can be defined as a mental illness, or are they using "mental illness" as a blanket term for a multitude of mental health disorders?

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105. *See id.*

106. *See* LoGiurato, *supra* note 73 (discussing the failed attempts at creating tighter firearm regulations); Amended Definition of "Adjudicated as a Mental Defective" and "Committed to a Mental Institution" 79 Fed. Reg. 774 (Jan. 7, 2014) (to be codified at 27 CFR Part 478).

107. *See supra* notes 62, 63, 67, 68 and accompanying text.

108. *See* Flock, *supra* note 84.

109. *See, e.g.,* McCreary, *Language, supra* note 14, at 818–19.

110. *See* McCreary, *Language, supra* note 14, at 842–43.

111. *See* Parker, *supra* note 71 (discussing reporting laws regarding individuals with mental illness); Liz Szabo, *Newtown Tragedy Failed To Tip The Balance*, USA TODAY (Dec. 10, 2013, 8:10 PM), [http://usatoday30.usatoday.com/LIFE/usaedition/2013-12-11-USA-has-made-slight-progress-on-mental-health-since-Newtown\\_ST\\_U.htm](http://usatoday30.usatoday.com/LIFE/usaedition/2013-12-11-USA-has-made-slight-progress-on-mental-health-since-Newtown_ST_U.htm) (discussing how many people assume individuals with mental illness are more violent than others).

Under the umbrella of mental health issues, there are a wide variety of diagnoses, including mental illnesses, anxiety disorders, and social disorders, all of which can be found in the Diagnostic and Statistical Manual of Mental Disorders (DSM).<sup>112</sup> Disorders can also vary in their severity, with the DSM-V including disorders ranging from gambling to schizophrenia.<sup>113</sup> Schizophrenia is a chronic and severe brain disorder that usually sets in between the ages of sixteen and thirty.<sup>114</sup> There are a wide variety of symptoms but the most common include hallucinations and delusions, though the severity of these symptoms varies from person to person.<sup>115</sup>

Depression is probably the most common mental disorder.<sup>116</sup> However, it is still widely misunderstood; everyone experiences times where they feel sad, but when a person has depression, it disrupts their daily life and its pain is disabling.<sup>117</sup>

Autism-spectrum disorder, as suggested by its name, is a spectrum of disorders varying in severity and is characterized as a developmental disorder.<sup>118</sup> Autism develops in childhood and its primary symptoms include social impairment, communication difficulties, and repetitive and stereotyped behaviors.<sup>119</sup> Asperger's syndrome is classified as a disorder on the autism spectrum due to its similarities with autism, such as difficulty in social situations and repetitive behavior.<sup>120</sup>

These are just examples of the wide variety of mental health disorders. Each is entirely different from the next and should be treated as such. To use "mental illness" as a blanket term to refer to all or some of these disorders without a clear understanding of what that term means and which disorders are included causes inaccuracies, stereotyping, and confusion. Each of these disorders does, however,

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112. See generally DSM-V, AM. PSYCHIATRIC ASSOC. (2013) (discussing mental health issues in Section II).

113. Compare DSM-5 SUBSTANCE-RELATED AND ADDICTIVE DISORDERS, AM. PSYCHIATRIC ASSOC., (2013), available at <http://www.dsm5.org/Documents/Substance%20Use%20Disorder%20Fact%20Sheet.pdf> (defining gambling as an addiction disorder), with DSM-5 SCHIZOPHRENIA, AM. PSYCHIATRIC ASSOC. (2013), available at <http://www.dsm5.org/Documents/Schizophrenia%20Fact%20Sheet.pdf> (characterizing schizophrenia as a disorder defined by delusions, hallucinations, and other severe symptoms).

114. See *Schizophrenia*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/schizophrenia/index.shtml> (last visited Jan. 13, 2014).

115. See *id.*

116. *Depression*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/depression/index.shtml> (last visited Apr. 20, 2014).

117. See *id.*

118. See *Autism Spectrum Disorder*, NAT'L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-pervasive-developmental-disorders/index.shtml> (last visited Jan. 13, 2014).

119. *Id.*

120. DSM-5 AUTISM SPECTRUM DISORDER FACT SHEET, AM. PSYCHIATRIC ASSOC. (2013), available at <http://www.dsm5.org/Documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf>.



have a couple of things in common: they can be improved with treatment and they do not, on their own, cause violent behavior.<sup>121</sup>

## 2. *Mental Illness Is Not A Reliable Predictor For Violence*

Every time a mass shooting occurs and the media reports that the motivation is not yet known, most assume that an irrational and violent person committed the act as a result of a mental illness.<sup>122</sup> However, the majority of individuals suffering from mental disorders will never become violent, thus the stigmatization of nonviolent sufferers of mental illness which results from blaming these disorders for horrific acts of violence is troublesome.<sup>123</sup> For example, Adam Lanza, the gunman responsible for the devastation in Newtown, Connecticut in 2012, has been identified by many as having autism or suffering from Asperger's Syndrome, although no official diagnosis has been made public.<sup>124</sup> The Autism Society spoke out in response to such reports, stating, "there is absolutely no evidence or any reliable research that suggests a linkage between autism and planned violence; to imply or suggest that some linkage exists is wrong and is harmful to more than 1.5 million law-abiding, nonviolent and wonderful individuals who live with autism each day."<sup>125</sup> Still, due to the public's lack of awareness about the link, or lack thereof, between autism and violent behavior, individuals with autism are stigmatized by media reports suggesting the two are related.<sup>126</sup>

In response to the Navy Yard shooting, Wayne LaPierre, the NRA's executive vice president, said that in order to prevent future massacres, more individuals suffering from mental illness must be put in psychiatric hospitals, stating that "if we leave these homicidal maniacs on the street . . . they're going to kill; they need

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121. See *Depression*, *supra* note 116; *Schizophrenia*, *supra* note 114 (explaining that treatment can relieve many symptoms of schizophrenia); Eric B. Elbogen & Sally C. Johnson, The Intricate Link Between Violence and Mental Disorder: Results From the National Epidemiologic Survey on Alcohol and Related Conditions, 66 J. AM. MED. ASS'N PSYCHIATRY 152, 155-57 (2009) (explaining that severe mental illness is not a strong predictor of violence); Amanda Gardner, Asperger's, Autism Not Linked to Violence: Experts, U.S. NEWS (Dec. 16, 2013), <http://health.usnews.com/health-news/news/articles/2012/12/16/aspergers-autism-not-linked-to-violence-experts>.

122. See Tom Rickhoff & Ellen Patterson, *Dangerous Minds Addressing Violence and Serious Mental Illness from One Judge's Perspective*, 76 TEX. B. J. 745, 746-47 (2013); Friedman, *supra* note 9.

123. See Friedman, *supra* note 9. Mental health professionals worry that fear of this sort of stigmatization may discourage people suffering from mental disorders from seeking treatment. Luo & McIntire, *supra* note 10; Rickhoff & Patterson, *supra* note 122, at 745-46.

124. See Friedman, *supra* note 9; Alice Park, *Don't Blame Adam Lanza's Violence on Asperger's*, TIME (Mar. 11, 2014), <http://time.com/19957/adam-lanzas-violence-wasnt-typical-of-aspergers/> (noting that Lanza's father recently stated that his son had been diagnosed with Asperger's, although this assertion has not been confirmed).

125. Miriam Falco, *Groups: Autism Not to Blame for Violence*, CNN, <http://www.cnn.com/2012/12/17/health/connecticut-shooting-autism/> (last updated Dec. 19, 2012, 10:12 AM).

126. *Id.*

to be committed.”<sup>127</sup> Beyond the offensive language, there are many issues with this statement, one being the assumption that individuals suffering from mental disorders are “homicidal maniacs.”<sup>128</sup> The National Epidemiologic Survey on Alcohol and Related Conditions (NESARC), a study completed in 2005 on the relationship between mental illness and violence, found that mental illness alone does not predict future violence.<sup>129</sup> It also found that there is a link between violence and severe mental illness,<sup>130</sup> but only significantly so in individuals with substance abuse problems.<sup>131</sup> Substance abuse tends to be a major determinant of violence whether in concurrence with a mental illness or not.<sup>132</sup> Anxiety disorders and autism-spectrum disorders do not seem to increase the risk of violence at all.<sup>133</sup>

Although the NESARC and other similar studies have shown that an individual suffering from both a severe mental illness and substance abuse may be more likely to become violent than others, the truth is that the vast majority of individuals who meet that description are harmless.<sup>134</sup> The best predictor of future violence is a history of violent behavior, regardless of the individual’s mental health.<sup>135</sup> Unfortunately, it is almost impossible to predict when and if a person, whether that individual is suffering from a mental disorder or not, will become violent.<sup>136</sup>

### 3. *Budget Cuts to Mental Health System and Lack of Mental Health Legislation*

Mental health problems are rather common with one in four adults suffering from a mental health disorder, one in seventeen living with a serious mental illness,

127. Szabo, *supra* note 111.

128. *See id.* (noting that many, like LaPierre, wrongly assume that individuals with mental illness are more violent than others).

129. Elbogen & Johnson, *supra* note 121 at 155–57.

130. *Id.* In this study, severe mental illnesses were identified as schizophrenia, bipolar disorder, and major depression. *Id.*

131. *Id.*

132. Stuart, *supra* note 21, at 123.

133. *See* Friedman, *supra* note 9; Falco, *supra* note 125; *Autism Society: No Link Between Autism and Planned Violence*, AUTISM SOC’Y, <http://www.autism-society.org/press-releases/autism-society-no-link-between-autism-and-planned-violence/> (last visited Apr. 20, 2014).

134. *See* Friedman, *supra* note 9; Stuart, *supra* note 21 at 122–23. Additionally, mass killings, although tragic, are rare in comparison to other violent acts. Friedman, *supra* note 9. Thus, even if preventing individuals with serious mental illnesses from possessing firearms could decrease mass killings, these measures would have little impact on overall violence caused by firearms. *Id.*

135. Rickhoff & Patterson, *supra* note 122, at 748 (*quoting* E. Fuller Torrey, *The Insanity Offense* 167, (2012)).

136. *See* Friedman, *supra* note 9 (*quoting* Jeffrey Swanson, professor of psychiatry at Duke University and a leading expert in the epidemiology of violence, who states that if you “profile perpetrators after the fact you’ll get a description of trouble young men, which also matches the description of thousands of other troubled young men who would never do something like this”).

and one in ten children living with a mental health condition.<sup>137</sup> Yet in recent years, there have been steep cuts in mental health funding, resulting in a lack of necessary treatment services.<sup>138</sup> Cutting the funding for mental health is detrimental in that it results in affected citizens being unable to receive the support and treatment that they need. The cut in funding also makes it more difficult to ensure that mental health information is being entered into the NICS database.<sup>139</sup> Sita Diehl, the state policy director at the National Alliance on Mental Illness, says that cutting mental health funding is “foolish” because “mental health [expenses] will show up in other systems; it shows up in the criminal justice system, it shows up in homelessness, it shows up in high emergency room usage.”<sup>140</sup> For these reasons, it is extremely important that mental health services receive adequate funding and support.

With the failure of gun legislation in the last year, Americans are beginning to see the need to improve the mental health system.<sup>141</sup> Policymakers are beginning to see mental health legislation as a potential route to combat gun violence.<sup>142</sup> As mentioned earlier, legislation attempting to improve the mental health system received wide support in Congress, but disappeared when the gun violence bill to which it was attached failed.<sup>143</sup> However, due to the support in Congress of the Mental Health Awareness and Improvement Act and Vice President Biden’s announcement about increased mental health funding, it seems likely that new mental health legislation not tied to firearm-related legislation may be introduced soon.<sup>144</sup>

#### IV. PROPOSED SOLUTION: FOCUS MORE ON MENTAL HEALTH AND LESS ON FIREARM REGULATIONS

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137. *Where We Stand: Violence, Mental Illness and Gun Reporting Laws*, NAT’L ALLIANCE ON MENTAL ILLNESS (Mar. 2013), [http://www.nami.org/Template.cfm?Section=NAMI\\_Policy\\_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=153162](http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=153162).

138. See Jenny Gold, *Promises To Fix Mental Health System Unfulfilled A Year After Sandy Hook*, NPR (Dec. 13, 2013, 4:48 AM), <http://www.npr.org/blogs/health/2013/12/13/250538554/promises-to-fix-mental-health-system-still-unfulfilled> (explaining that although thirty-six states increasing funding in 2013, it comes after years of budget cuts). See also *Where We Stand*, *supra* note 137 (noting that a large percentage of individuals with diagnosed mental health issues do not receive treatment).

139. See Stanley, *supra* note 20, at 905, 907 (discussing how many of the perpetrators who committed mass violence sought help for their mental health issues but did not receive it).

140. Gold, *supra* note 138.

141. See Vasilogambros, *supra* note 18 (discussing a Gallup Poll that found Americans blame the failure of the mental health system more than any of the other choices, even above “easy access to guns”).

142. See Killough, *supra* note 18 (discussing mental health bills in Congress).

143. See *supra* notes 74–77 and accompanying text (discussing the Mental Health Awareness and Improvement Act).

144. *Supra* notes 76–78 and accompanying text.

Attempts to clarify the Gun Control Act's language have not stopped gun violence.<sup>145</sup> The introduction of new federal gun legislation has repeatedly failed.<sup>146</sup> Mass shootings continue to occur and people suffering from mental illness continue to receive inadequate treatment and support.<sup>147</sup> The public continues to be ignorant of how unlikely it is that an individual suffering from a mental disorder will become violent, causing a large at-risk group of Americans and their families to be stigmatized and left without the support and understanding that they need.<sup>148</sup> The only way to even begin to tackle these problems is by aiming our efforts at preventative mental health measures and ensuring that it receives both the attention and the funding that it deserves and needs.<sup>149</sup>

A. *Improved Treatment is the Answer*

In light of the recent tragedies caused by individuals such as Elliott Rodger, James Holmes, Adam Lanza, and Aaron Alexis and the reports that all or some were suffering from some sort of mental disorder at the time of their actions, mental health has certainly become a hot topic.<sup>150</sup> Naturally, not everyone agrees on how to best handle the mental health system's shortcomings. As discussed above, Wayne LaPierre, the NRA's executive vice president, said that in order to prevent future massacres, we need to take the "homicidal maniacs" off of the street and commit them to mental institutions.<sup>151</sup> However, Mark Covall, the president and CEO of the National Association of Psychiatric Health Systems, thinks that recent tragedies have actually led to a more open discussion of mental health where the public is realizing that these individuals are our neighbors and our family members.<sup>152</sup> Regardless of whether the goal is to make the federal background check system workable in the context of gun legislation or to simply help the at-

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145. See McCreary, *Language*, *supra* note 14, at 840–42 (discussing the difficulties in interpreting the language of the Gun Control Act and continued violence).

146. See *supra* notes 76–78 and accompanying text (discussing the failed Safe Communities, Safe Schools Act).

147. See Killough, *supra* note 18 (discussing how not much changed in the year after the Newton shooting in terms of preventing mass shootings).

148. See *supra* notes 123–26 and accompanying text (discussing the public assumption that Lanza's Asperger's syndrome caused his violent behavior).

149. See Rickhoff & Patterson, *supra* note 122, at 747 (arguing that preventative health measures are a better solution than "endless gun control debate"). See also Gold, *supra* note 138 (arguing that "cutting mental health funding...is foolish because mental health expenses show then just show up in other ways").

150. See Milloy, *supra* note 5 (discussing the Navy Yard shooting and how more Americans are starting to think that mental health is a greater cause of violence than guns); Coffman, *supra* note 12 (noting how James Holmes had seen mental health professionals prior to the shooting).

151. See *supra* note 127 and accompanying text.

152. See Szabo, *supra* note 111 (quoting Mark Covall) ("[T]hese folks are increasingly being viewed as our neighbors, our family members, and there is more of a sense that it can happen to anyone.").

risk individuals and their families receive the care that they need, the solution is the same: improve the country's mental health treatment system.<sup>153</sup>

Think back to the story summarized above about Stephanie Escamilla and her fourteen-year old son suffering from bipolar disorder and psychosis.<sup>154</sup> With the support of his mother, family, and doctors, this young boy has learned to live with his disorder; yes, his voices sometimes tell him to do terrible things, but he has learned to overcome them because he does not want to be violent and he does not want to cause others pain.<sup>155</sup> Everyone deserves a support system like that and a chance to learn how to cope with these disabling disorders. Ms. Escamilla, however, should not have had to fight so hard on her own for her family's support and for help from the mental health system.

According to the National Institute of Health, every mental disorder can be improved with treatment.<sup>156</sup> Treatment can include medicine or therapy and therapy can refer to intensive inpatient treatment or just simple exercises to be completed in the home.<sup>157</sup> Because treatment is available, it is inexcusable that more than two thirds of adults and one half of children with diagnosed mental disorders are not receiving treatment in a given year.<sup>158</sup> Robert Bernstein, president of the Bazelon Center for Mental Health Law, said that even those that do receive treatment generally do not receive quality services.<sup>159</sup> Aaron Alexis and James Holmes both sought help from professionals for their mental disorders; before questioning why they were able to obtain firearms, we need to ask why our system failed them.<sup>160</sup> Adam Lanza was too young to purchase a gun, but he still managed to obtain several;<sup>161</sup> if Lanza's violent behavior was really due to a mental disorder<sup>162</sup> we should focus our efforts on better screening and treatment of psychiatric illnesses in young people.

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153. See *Where We Stand*, *supra* note 137 (asserting that the best way to prevent violence committed by individuals with mental illness is to make “[p]ublic policies and programs that provide access to early diagnosis, crisis intervention, appropriate treatment and support” available and accessible).

154. See *supra* notes 25–34 and accompanying text (discussing Stephanie Escamilla's story).

155. *Supra* notes 25–34 and accompanying text.

156. *Treatment and Services*, NAT'L ALLIANCE ON MENTAL ILLNESS, [https://www.nami.org/template.cfm?section=About\\_Treatments\\_and\\_Supports](https://www.nami.org/template.cfm?section=About_Treatments_and_Supports) (last visited Apr. 11, 2014).

157. See *Depression*, *supra* note 116 (noting that “medications, psychotherapies, and other methods can effectively treat people with depression”); see also *Schizophrenia*, *supra* note 114 (asserting that “treatment helps relieve many symptoms of schizophrenia”).

158. See *Where We Stand*, *supra* note 137.

159. Jason Cherkis, *Sandy Hook Mental Health: Program Gaps May Be Easier To Fix Than Gun Laws*, HUFFINGTON POST (last updated Dec. 20, 2012, 9:33 AM), [http://www.huffingtonpost.com/2012/12/19/sandy-hook-mental-health-program\\_n\\_2334017.html](http://www.huffingtonpost.com/2012/12/19/sandy-hook-mental-health-program_n_2334017.html).

160. *Id.*; Stanley, *supra* note 20, at 892–94.

161. Friedman, *supra* note 9.

162. Again, this is problematic as the research shows that there is no link between Autism and violent behavior. Falco, *supra* note 124.

The National Alliance on Mental Illness (NAMI) recognizes that the acts of violence that are committed by those with mental disorders are because of the mental health system's failures.<sup>163</sup> It says that we need public policies and programs that provide access to early diagnosis, crisis intervention, appropriate treatment and support, including integrated treatment when there is co-occurring substance abuse.<sup>164</sup> It also emphasized the importance of family support and education.<sup>165</sup>

### B. *Teamwork is the Key to Success*

In order for mental health treatment to be effective, family members and the community must be willing to help and provide resources for the at-risk individual.<sup>166</sup> This can be done through better education regarding mental illness and mental disorders and enhanced public awareness.<sup>167</sup> Heightened public awareness will also help to reduce the stigma associated with mental disorders; often individuals who need treatment resist seeking help for fear of suffering negative consequences like losing housing or employment.<sup>168</sup>

For a treatment plan to be effective, it is important that a team of professionals be working with the patient and his or her family.<sup>169</sup> This means that psychiatrists, therapists, attorneys, case managers, judges, and anyone else involved in a particular case work together, whether this is in regards to informing the family of the patient's treatment or providing the state with information about an individual for the NICS.<sup>170</sup> Even if a patient has the full support and understanding of his or her family, the resources available to them determine what the family can or cannot do for the individual, as illustrated by Stephanie Escamilla's story.<sup>171</sup>

There are several examples of states and counties that have adopted team-style approaches to mental health care that have proven successful.<sup>172</sup> In Bexar

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163. See *Where We Stand*, *supra* note 137 (noting that individuals with mental illness should not be treated differently in regards to firearm access, and violence caused by these individuals is a result of the shortcomings of the mental health system).

164. *Id.*

165. *Id.*

166. See Rickhoff & Patterson, *supra* note 122, at 747 (asserting that when a person is in need of treatment, family members must be empowered to help).

167. See *id.*

168. See *Where We Stand*, *supra* note 137.

169. See Rickhoff & Patterson, *supra* note 122 at 746–49 (discussing a successful teamwork model in Texas); see also Cherkis, *supra* note 159 (discussing teamwork models in Milwaukee and Memphis).

170. See Rickhoff & Patterson, *supra* note 122, at 746–49.

171. See Drash, *supra* note 25 (explaining that Ms. Escamilla's family was in denial of her son's disorder and that she often had difficulty finding hospitals to admit him).

172. See generally Rickhoff & Patterson, *supra* note 122, at 746 (discussing the teamwork model in Bexar County, Texas); Cherkis, *supra* note 160 (discussing teamwork models in Milwaukee, Tennessee, and Memphis).

County, Texas, patients who have received court-ordered post-hospitalization services are treated at the Involuntary Outpatient Commitment Clinic (IOPC).<sup>173</sup> There, a civil judge with an expertise in mental health treatment who is familiar with each individual patient works with a team of professionals including a psychiatrist, court-appointed attorney, and case managers to create a treatment plan.<sup>174</sup> The team works with the patient discussing the patient's concerns regarding "health insurance, medications, living situations, . . . and goals," and the patient receives encouragement for accomplishments.<sup>175</sup> The benefits of working with the same team are huge for the patient and the Bexar County IOPC's usage of this system of accountability and responsibility has potentially saved lives.<sup>176</sup>

Milwaukee has a program entitled "Wraparound Milwaukee" which provides coordinated services and therapies where the treatment plans are lead by the families of the at-risk individuals.<sup>177</sup> Tennessee has a nonprofit program called "Youth Villages" which works with a number of states and coordinates in-home services for children.<sup>178</sup> Memphis created a "Crisis Intervention Team" in the 1980s where police officers complete intensive training regarding mental health issues to be better enabled to handle crises involving individuals with mental health issues.<sup>179</sup> The Maryland Task Force suggested a similar goal where both law enforcement and health professionals would be educated on mental disorders and the current state of the law.<sup>180</sup> Hopefully these few states that have implemented these successful teamwork approaches to addressing mental health problems in their communities will serve as a model for other states to do the same.

### C. *Mental Health Needs More Funding and New Legislation*

Better mental health treatment across the country cannot be achieved without increased funding. In addition to Vice President Biden's recent announcement about increasing funds for mental health, a total of thirty-six states increased funding for mental health in 2013.<sup>181</sup> While that is definitely a step in the right direction, it follows four years of cuts to the mental health budget during the recession.<sup>182</sup>

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173. Rickhoff & Patterson, *supra* note 122.

174. *Id.*

175. *Id.*

176. *Id.*

177. Cherkis, *supra* note 160. Mississippi has a similar program but it lacks funding to be successfully implemented. *Id.*

178. *Id.*

179. *See id.*

180. Dooley & McCauley, *supra* note 94, at 11.

181. Gold, *supra* note 138; Mason & Rampton, *supra* note 78.

182. *See Szabo, supra* note 111.

Mental health funding is also important because many at-risk individuals are unable to afford the health services that they need.<sup>183</sup> Fortunately, the Patient Protection and Affordable Care Act (ACA),<sup>184</sup> has the potential to ensure that a large number of these individuals receive the mental health services that they need.<sup>185</sup> The ACA expands coverage of mental health by providing health care to more Americans, by including mental health and substance use disorder benefits in the Essential Health Benefits, and by applying federal parity protections to mental health and substance use disorder benefits.<sup>186</sup> Additionally, many states have opted to expand Medicaid, which pays for a large portion of all mental health services.<sup>187</sup>

In addition to funding, it is important that both state and federal legislation with the aim of improving mental health services be passed. As mentioned above, the Mental Health Awareness and Improvement Act received much support in Congress but still failed.<sup>188</sup> Such bills must be introduced without being tied to gun legislation to ensure that the increased funding for mental health services is being used correctly and effectively.<sup>189</sup>

#### D. Gun Legislation After Improved Mental Health Treatment

So what does this mean for gun control legislation targeting those with mental disorders? Should improving mental health services replace such laws or should they work in conjunction with one another? Regardless of one's opinion on that matter, the mental health services must be improved before laws regulating the ability of individuals with mental disorders to possess or purchase firearms can make any meaningful difference. In regard to gun laws, improved mental health services will have the benefit of providing states with more detailed information about what to report to the NICS and such information will actually exist if more people are able to receive the treatment that they require.

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183. See Sarah Kiff, *Seven Facts about America's Mental Health Care System*, WASH. POST (Dec. 17, 2012, 1:09PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/seven-facts-about-americas-mental-health-care-system/>.

184. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

185. See 42 U.S.C. § 1396w-3(b)(1)(F) (2010) (requiring states to establish procedures to enroll eligible individuals with mental health or substance-related disorders); see also *id.* § 1396w-4(e) (improving and expanding Medicaid to prevent and treat mental illness).

186. 42 U.S.C. § 18022 (b)(1)(E); 42 U.S.C. § 1396u-7(b)(6); see also Kirsten Beronio et al., *Affordable Care Act Will Expand Mental Health and Substance Use Disorder Benefits and Parity Protections for 62 Million Americans*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 2013), [http://aspe.hhs.gov/health/reports/2013/mental/rb\\_mental.cfm](http://aspe.hhs.gov/health/reports/2013/mental/rb_mental.cfm).

187. See Szabo, *supra* note 111 (stating that twenty-five states and the District of Columbia have expanded Medicaid "which pays for 27% of all mental health services").

188. See *supra* notes 24, 76-78 and accompanying text.

189. See *supra* notes 76-78.



In crafting such gun laws, safeguards to protect the privacy of the individuals must be established.<sup>190</sup> Mental health professionals have expressed concern that gun-reporting criteria may interfere with individuals' willingness to seek treatment out of fear of being placed in a database maintained by the government.<sup>191</sup> If these concerns ring true, gun regulations will actually have extremely detrimental results: individuals with mental health issues, whether likely to become violent or not, will refuse to seek treatment thus disabling their own lives and potentially the lives of those with whom they interact. Without seeking treatment, these individuals will also likely not be registered in NICS<sup>192</sup> even if they do exhibit signs of dangerousness. However, determining when a person should be entered in the federal background check system is and will continue to be complex, even if mental health services are improved.<sup>193</sup> Ron Honberg of NAMI explained that it is extremely important for individuals with mental disorders to have therapeutic relationships with their doctors and warned that giving doctors the responsibility of "making judgments about people who may be violent and reporting them to state police. . .[is] going to compromise that relationship."<sup>194</sup> Thus, stricter gun regulations targeting the mentally ill and stricter guidelines for doctors to report patients to the NICS must be created with these concerns in mind.

Focusing on improving mental health services will hopefully also have the result of producing more information about why certain individuals become violent. Josh Horowitz, the executive director of Coalition to Stop Gun Violence suggests that the gun control debate should move away from mental illness and should instead focus on factors that directly correlate to violence because a history of violence, not mental illness, is the best predictor of future violence.<sup>195</sup> The NICS reporting system should be modernized to reflect the latest knowledge about risk factors for violence in individuals with severe mental illness.<sup>196</sup> He suggests that, in regard to firearm possession, mental health professionals and courts should make determinations of dangerousness rather than diagnoses.<sup>197</sup> While the interest in tightening gun regulations is understandable in light of recent mass shootings, the focus should first and foremost be on improving mental health treatment. Until we

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190. *See* Where We Stand, *supra* note 137.

191. *See id.*

192. *See supra* notes 66–69.

193. *See* EDWARD C. LIEU ET AL., CONG. RESEARCH SERV., SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 8 (Apr. 15, 2013), *available at* <http://www.fas.org/sgp/crs/misc/R43040.pdf> (“[S]tate reporting of mental health records to NICS is impeded by a complex set of obstacles including technological and logistical problems, privacy concerns, insufficient funding, and a lack of leadership”).

194. Flock, *supra* note 84.

195. *See id.*

196. *See id.*

197. *Id.*

have a better understanding of *who* is becoming violent and why, legislation targeting the mentally ill will remain stagnant.

#### V. CONCLUSION

Stricter gun laws could be successful in preventing mass violence, if we are able to determine when a person—any person, not just someone with a mental disorder—is likely to become violent. It is unclear whether laws aimed specifically at those with mental disorders would have the same effect or not due to the fact that mental disorders do not seem to make a person more likely to become violent. Regardless, the current mental health systems in this country need to be improved.<sup>198</sup> Improvement to these systems would allow for more individuals to receive the necessary treatment, resulting in a better quality of life for them, their families, and their communities.<sup>199</sup> Additionally, a stronger focus on mental health would result in a better public awareness of these issues, which would lessen the misuse of terms such as “mental illness” and “mental disorders” while encouraging families and communities to help at-risk individuals receive the treatment that they need.<sup>200</sup> It is time to stop stigmatizing people who suffer from mental disorders and categorizing them as violent, and time to provide them with necessary support. Until that happens, gun legislation targeting those with mental health issues will continue to be ineffective.

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198. *See supra* Part IV.

199. *See supra* Part IV.

200. *See supra* Part IV.