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Missing The Mark: Gun Control Is Not The Cure For What Ails The U.S. Mental Health System

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MISSING THE MARK:

**GUN CONTROL IS NOT THE CURE FOR
WHAT AILS THE U.S. MENTAL HEALTH
SYSTEM**

CAROLYN REINACH WOLF* & JAMIE A. ROSEN**

Recent gun control legislation aimed at removing guns from the hands of the mentally ill in order to reduce violence is misguided. In fact, this only contributes to the mistaken belief that there is a direct link between mental illness and violence. This Article suggests that instead, policymakers should be focusing on modifying existing restrictive mental health laws and increasing the funding needed to provide adequate mental health services in the community. Family members, the community, and the individuals themselves must have access to adequate resources and support systems to increase the individual's chance of recovery and stability. In light of recent tragedies, a better solution to reducing gun violence includes offering community programs and preventive training in educational and workplace environments to allow for early detection and

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intervention. The current system does not support those in need of treatment and only serves to exacerbate the stigma associated with mental illness.

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INTRODUCTION

Recent mass shootings such as those at a grocery store in Tucson, Arizona,¹ an elementary school in Newtown, Connecticut² and the Navy Yard in Washington, D.C.,³ have motivated state governments across the

¹ On January 8, 2011, twenty-two-year-old Jared Lee Loughner opened fire outside a supermarket in Tucson, Arizona, killing six people and badly injuring then-Representative Gabrielle Giffords. Marc Lacey & David M. Herszenhorn, *Congresswoman Is Shot in Rampage near Tucson*, N.Y. TIMES, Jan. 9, 2011, at A1.

² On December 14, 2012, twenty-year-old Adam Lanza fatally shot twenty children and six adults at Sandy Hook Elementary School in Newtown, Connecticut, and then committed suicide. James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A1; *Sandy Hook Report Reveals Every Step Adam Lanza Took on Killing Spree*, HUFFINGTON POST (Nov. 25, 2013, 3:16 PM), http://www.huffingtonpost.com/2013/11/25/sandy-hook-report-_n_4337482.html, archived at <http://perma.cc/D6D4-MWSL>.

³ On September 16, 2013, thirty-four-year-old Aaron Alexis killed twelve people and wounded eight others in a mass shooting at a military facility at the Washington Navy Yard. Michael D. Shear & Michael S. Schmidt, *12 Shot to Death by Lone Gunman at a Naval*

country to draft policies that would more strictly limit the gun rights of those with mental illness.⁴ These policies contribute to the belief that all individuals with mental illness are dangerous. These tragedies repeatedly renew the debate over gun regulations as the appropriate response to gun violence,⁵ instead of raising awareness that these incidents may have been prevented if the perpetrator had received timely treatment.⁶ Policymakers have not focused on treatment, modified existing restrictive mental health laws, or increased funding for mental health services. Instead, they have concentrated on gun control and taking guns out of the hands of people who suffer from mental illness or behavioral health issues, as well as requiring mental health professionals to report dangerous people to the authorities.⁷

The problem with tying mental illness to the gun control debate is that people assume those with mental illnesses are more prone to violence than those without these issues.⁸ The truth is that individuals falling into the category of “mentally ill” only account for a small fraction of all violent conduct.⁹ Simply having a mental illness is not a strong predictor of future violence.¹⁰ Individuals who have exhibited dangerous behaviors in the past, have a criminal record, or have a history of drug abuse, for example, are much more likely to commit future violent crimes.¹¹ In fact, the risk of

Base, N.Y. TIMES, Sept. 17, 2013, at A1; Michael Pearson et al., *Navy Yard Shooting Survivor: 'I Got Lucky'*, CNN (Sept. 18, 2013), <http://www.cnn.com/2013/09/18/us/navy-yard-shooting-main/>, archived at <http://perma.cc/SAB9-F7AS>.

⁴ Michael Luo & Mike McIntire, *When Right to Bear Arms Includes the Mentally Ill*, N.Y. TIMES, Dec. 22, 2013, at A1.

⁵ Katherine L. Record & Lawrence O. Gostin, *Dangerous People or Dangerous Weapons: Keeping Arms away from the Dangerous in the Wake of an Expansive Reading of the Second Amendment*, ADMIN. & REG. L. NEWS, Summer 2012, at 8, 8.

⁶ Katherine B. Cook, *Revising Assisted Outpatient Treatment Statutes in Indiana: Providing Mental Health Treatment for Those in Need*, 9 IND. HEALTH L. REV. 661, 662 (2012).

⁷ See Luo & McIntire, *supra* note 4 (stating that the recent mental health debate focuses mostly “on two areas: requiring mental health professionals to report dangerous people to the authorities and expanding the mental health criteria for revoking gun rights”).

⁸ See Douglas Mossman, *The Imperfection of Protection Through Detection and Intervention*, 30 J. LEGAL MED. 109, 136 (2009) (“Most violence is not committed by persons with mental illness.”), quoted in Adam Lamparello, *Why Wait Until the Crime Happens? Providing for the Involuntary Commitment of Dangerous Individuals Without Requiring a Showing of Mental Illness*, 41 SETON HALL L. REV. 875, 891 (2011).

⁹ Marie E. Rueve & Randon S. Welton, *Violence and Mental Illness*, PSYCHIATRY, May 2008, at 35, 36.

¹⁰ See *Consortium for Risk-Based Firearms Policy Recommends Evidence-Based Changes to State and Federal Gun Policies*, DEV. MENTAL HEALTH L., Feb. 2014, at 1, 2–3. Predictors for future violence include “a history of violent crime, perpetration of domestic violence, alcohol abuse and drug abuse.” *Id.* at 3.

¹¹ *Id.* See also James B. Jacobs & Jennifer Jones, *Keeping Firearms out of the Hands of*

violence, if any, by a person suffering from a serious mental illness may increase when the proper treatment, support, and medication are not available.¹²

Many shootings, whether on a college campus or in a workplace setting, could be prevented not solely through stricter gun control laws,¹³ but rather through a higher level of mental health awareness in these respective communities and increased funding for community and support services. Unfortunately, funding for mental health care has diminished significantly; over the past few years, states have cut approximately \$4.35 billion from their mental health care budgets.¹⁴ While it is important to control access to firearms by those who are prone to violence (not just those with mental illness), it is more important that we fix the flawed mental health system, starting with increasing the funding for, and availability of, mental health services.

This Article will examine the ways in which recent gun control laws in the United States do or do not address relevant mental health issues. Part I presents an overview of mental illness and the importance of ongoing treatment throughout an individual's lifetime. Part II discusses different current gun control laws across the United States and evaluates their impact on the mental health community. Part III explains the concerns of medical and mental health professionals, including the impact on doctor-patient relationships and confidentiality issues, among others. Part IV explores possible improvements to gun control laws and to the broken mental health system, such as the use of Behavioral Intervention Teams in educational and workplace environments. Finally, the Conclusion reinforces the argument that providing better mental health care resources for those with mental illness will do more in the long run to reduce violence than more stringent gun control laws.

the Dangerously Mentally Ill, 47 CRIM. L. BULL. 388, 408 (2011).

¹² RON HONBERG ET AL., NAT'L ALLIANCE ON MENTAL ILLNESS, STATE MENTAL HEALTH CUTS: A NATIONAL CRISIS 2 (2011), <http://www.nami.org/ContentManagement/ContentDisplay.cfm?ContentFileID=126233>, archived at <http://perma.cc/6LUP-UPAB>.

¹³ Morgan Stanley, Comment, *Gun Control Is Not Enough: The Need to Address Mental Illness to Prevent Incidences of Mass Public Violence*, 15 SCHOLAR 875, 877 (2013). "The failure to take notice of warning signs, bullying, violent role models, drug use, [and] societal encouragement of violence and extremism," among others, are all potential reasons that gun violence occurs. *Id.*

¹⁴ Mike Maciag, *Spotlight Shifts to Mental Health and States' Funding Cuts*, GOVERNING (Dec. 20, 2012), <http://www.governing.com/blogs/by-the-numbers/state-mental-health-funding-costs-and-budgets.html>, archived at <http://perma.cc/7LH6-5P7Y>; see also 60 Minutes: *Nowhere to Go, Help Wanted, Jay Leno*, (CBS television broadcast Jan. 26, 2014).

I. UNDERSTANDING MENTAL ILLNESS

Mental illness refers to a diagnosed medical condition that “often result[s] in a diminished capacity for coping with the ordinary demands of life.”¹⁵ The significant behavioral or psychological symptoms of these illnesses result in the impaired ability to think, feel, and relate to others.¹⁶ Early identification and access to treatment are extremely important when it comes to reducing symptoms and improving one’s quality of life.¹⁷ There is no “cure” for mental illness;¹⁸ in order to experience relief from symptoms, treatment (i.e., psychiatric medication, psychotherapy, brain-stimulation treatments, hospitalizations, residential treatment programs, or substance abuse counseling and support groups)¹⁹ must continue over the individual’s lifetime.²⁰

The recovery or treatment process can span a lifetime, meaning that the individual participating needs individual strength, insight, supportive relationships, and community services in order to function in society.²¹ There are two major aspects of recovery: first, stabilizing symptoms and restoring social function and, second, changing one’s attitudes and feelings, and developing a new meaning or purpose in one’s life.²² The key to both

¹⁵ *What Is Mental Illness?*, NAT’L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Template.cfm?Section=By_Illness (last visited Aug. 23, 2014), *archived at* <http://perma.cc/ZSM3-KVPX>. The DSM-5 defines “mental disorder” as “a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotional regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning.” AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20* (5th ed. 2013).

¹⁶ NAT’L ALLIANCE ON MENTAL ILLNESS, *supra* note 15.

¹⁷ NAT’L INST. OF MENTAL HEALTH, DEP’T OF HEALTH & HUMAN SERVS., PROGRAM ANNOUNCEMENT 00-094, EARLY IDENTIFICATION AND TREATMENT OF MENTAL DISORDERS IN CHILDREN AND ADOLESCENTS, (May 17, 2000), *available at* <http://grants.nih.gov/grants/guide/pa-files/PA-00-094.html>, *archived at* <http://perma.cc/9QKU-6V5S>.

¹⁸ *Frequently Asked Questions: Treatments*, NAT’L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Template.cfm?Section=Frequently_Asked_Questions&Template=/ContentManagement/ContentDisplay.cfm&ContentID=79713 (last visited Aug. 23, 2014), *archived at* <http://perma.cc/5MC5-K3KM>.

¹⁹ Mayo Clinic Staff, *Treatments and Drugs*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/mental-illness/basics/treatment/con-20033813> (last updated May 3, 2014), *archived at* <http://perma.cc/AJ27-56Z7>.

²⁰ See NAT’L ALLIANCE ON MENTAL ILLNESS, *supra* note 18. It is interesting to note, however, that for certain mental illnesses, there may not be a “cure,” but there is a possibility that the individual no longer meets the criteria for diagnosis after a period of treatment.

²¹ Press Release, Substance Abuse and Mental Health Servs. Admin., SAMHSA Announces a Working Definition of “Recovery” from Mental Disorders and Substance Use Disorders (Dec. 22, 2011, 10:00 AM), <http://www.samhsa.gov/newsroom/advisories/1112223420.aspx>, *archived at* <http://perma.cc/6WYU-4K8V>.

²² MIKE SLADE, *RETHINK RECOVERY SERIES VOL. 1, 100 WAYS TO SUPPORT RECOVERY* 4

aspects, however, is having a support system; a support group, therapist, friends, or family members are essential as the individual goes through the challenges of recovery.²³ Working with a mental health professional can help the individual achieve treatment goals.²⁴ The reality is that there are sometimes severe consequences for the individual if a mental illness goes untreated: unemployment, substance abuse, homelessness, incarceration, and suicide, among others.²⁵ Through the use of medications and therapeutic services, most individuals suffering from a mental illness can minimize the impact of that mental illness on their life and experience some level of recovery.²⁶

Despite the beneficial outcomes that individuals can experience from adequate mental health care, significant barriers exist, blocking access to that care. The high cost of mental health care, the shortage of mental health professionals around the country, and the public's negative attitudes about mental illness all prevent individuals from seeking help.²⁷ Additionally, and with harmful consequences, recent gun control legislation targets the mentally ill which exacerbates the stigma about violence and mental illness and may deter individuals from seeking the care they need.

(2009), http://www.mentalhealthrecovery.com/recovery-resources/documents/100_ways_to_support_recovery1.pdf, archived at <http://perma.cc/6D4W-5GVD>.

²³ See Diane R. Gehart, *The Mental Health Recovery Movement and Family Therapy, Part I: Consumer-Led Reform of Services to Persons Diagnosed with Severe Mental Illness*, 38 J. MARITAL & FAM. THERAPY 429, 433 (2012); *Recovery*, MENTAL HEALTH FOUND., <http://www.mentalhealth.org.uk/help-information/mental-health-a-z/R/recovery/> (last visited Aug. 24, 2014), archived at <http://perma.cc/AA2D-7JJL>. Challenges include patients' potential lack of insight that they have a mental illness and need treatment for it, as well as adverse side effects from psychiatric medication. Cook, *supra* note 6, at 666–67. Stigma and a lack of available services are further challenges that many individuals must overcome.

²⁴ A mental health professional can help the individual form a treatment plan, change behaviors, and build self-esteem. *Get Professional Help if You Need It*, MENTAL HEALTH AM., <http://www.mentalhealthamerica.net/get-professional-help-if-you-need-it> (last visited Aug. 24, 2014), archived at <http://perma.cc/BZ9A-CVJL>. Mental health professionals include psychiatrists, psychologists, social workers, and case managers. *Id.*

²⁵ *Consequences of Non-treatment*, TREATMENT ADVOCACY CTR., <http://www.treatmentadvocacycenter.org/problem/consequences-of-non-treatment> (last visited Aug. 24, 2014), archived at <http://perma.cc/9SCZ-TDDT>; *What Is Mental Illness: Mental Illness Facts*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/template.cfm?section=about_mental_illness (last visited Aug. 24, 2014), archived at <http://perma.cc/975B-SX3A>.

²⁶ Cook, *supra* note 6, at 668 n.45 (“Most people with serious mental illness need medication to help control symptoms.” (internal quotation marks and citation omitted)); NAT'L ALLIANCE ON MENTAL ILLNESS, *supra* note 25.

²⁷ Sarah Kliff, *Seven Facts About America's Mental Health-Care System*, WASH. POST (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/seven-facts-about-americas-mental-health-care-system/>, archived at <http://perma.cc/PT6N-SWQ7>.

II. GUN CONTROL LAWS AROUND THE UNITED STATES

The purpose of the federal and state gun reporting laws is to ensure that communities across the United States are safe from gun violence. In order to achieve this objective, those gun laws should be based on propensity or actual violence, not mental illness. “[R]eactionary gun control legislation²⁸ fails to halt violent gun crime,” however, “because [it] do[es] not address the root causes of gun crime.”²⁹ Nevertheless, several states passed measures aimed specifically at keeping people who are mentally ill from accessing guns.³⁰ State legislatures must acknowledge that it is more effective to aim our efforts at preventative mental health measures than to engage in endless gun control debate.³¹ This Part will discuss different gun control laws across the United States and explore their impact on the mental health system, highlighting two states that have recently targeted the mentally ill.

A. NEW YORK

After the shooting at Sandy Hook Elementary School,³² the first gun control bill to become law was the New York Secure Ammunition and Firearms Enforcement Act of 2013 (“SAFE Act”).³³ The SAFE Act is a prime example of “reactionary gun control legislation”³⁴ as it was essentially passed overnight.³⁵ The intention behind passing the SAFE Act

²⁸ “Reactionary gun control legislation” refers to “an older legislative practice of passing or proposing laws subsequent to any instance of violent crime.” Aimee Kaloyares, *Annie, Get Your Gun? An Analysis of Reactionary Gun Control Laws and Their Utter Failure to Protect Americans from Violent Gun Crimes*, 40 S.U. L. REV. 319, 330 (2013).

²⁹ *Id.* at 319. See *Consortium for Risk-Based Firearms Policy Recommends Evidence-Based Changes to State and Federal Gun Policies*, *supra* note 10, at 6, for a list of “categories of individuals at high risk of [gun] violence.”

³⁰ See *Mental Health Reporting Policy Summary*, LAW CTR. TO PREVENT GUN VIOLENCE (Sept. 16, 2013), <http://smartgunlaws.org/mental-health-reporting-policy-summary/>, archived at <http://perma.cc/8LQU-6RCQ> (“Forty-three states have laws that require or authorize the reporting of some mentally ill people to the federal NICS database or a state database for use in firearm purchaser background checks.”).

³¹ Tom Rickhoff & Ellen Patterson, *Dangerous Minds: Addressing Violence and Serious Mental Illness from One Judge’s Perspective*, 76 TEX. B.J. 745, 747 (2013).

³² See Barron, *supra* note 2.

³³ New York Secure Ammunition and Firearms Enforcement (SAFE) Act, 2013 N.Y. Sess. Laws 1 (McKinney) (codified as amended at N.Y. MENTAL HYG. LAW § 9.46); *Governor Cuomo Signs Groundbreaking Legislation that Will Give New York State the Toughest Protections Against Gun Violence in the Nation*, GOVERNOR ANDREW M. CUOMO (Jan. 15, 2013), <https://www.governor.ny.gov/print/4847>, archived at <http://perma.cc/72ZM-2X4U>.

³⁴ Kaloyares, *supra* note 28, at 330.

³⁵ The New York SAFE Act passed the New York State Senate on January 14, 2013,

was to enhance public safety by preventing “criminals and the dangerously mentally ill” from purchasing a gun through the use of universal background checks.³⁶ This legislation significantly impacts all mental health professionals, but was created with “seemingly little input from [them].”³⁷

Certain mental health professionals in New York are now required to report patients they deem dangerous to themselves or others.³⁸ The SAFE Act establishes Section 9.46 of the New York Mental Hygiene Law, which requires “physician[s], psychologist[s], registered nurse[s], [and] licensed clinical social worker[s]”³⁹ to report patients they believe are “likely to engage in conduct that would result in serious harm to self or others” to county authorities.⁴⁰ This standard, as defined in Section 9.01 of the Mental Hygiene Law, means “threats of or attempts at suicide or serious bodily harm” to self or “homicidal or other violent behavior” towards others.⁴¹ The reporting requirement, which went into effect in March 2013, allows the state—after following a long and laborious procedure—to revoke a person’s firearms license and confiscate any weapons.⁴² “[E]ven if [the] mental health clinician believes that the patient would respond well to treatment and has no reason to believe the patient owns [or has access to] a gun,” the professional must report the patient.⁴³

passed the State Assembly on January 15, 2013, and was delivered to and signed by Governor Andrew Cuomo on the same day. New York Secure Ammunition and Firearms Enforcement (SAFE) Act, 2013 N.Y. Sess. Laws 1 (McKinney); Bill No. S02230 Actions, N.Y. STATE ASSEMBLY, http://assembly.state.ny.us/leg/?default_fld=&bn=S02230&term=&Actions=Y (last visited Sept. 6, 2014), archived at <http://perma.cc/56T5-AQGY>.

³⁶ NY SAFE, GOVERNOR ANDREW M. CUOMO, <http://www.governor.ny.gov/nysafeact/gun-reform> (last visited Aug. 24, 2014), archived at <http://perma.cc/9FGK-2XXF>. The SAFE Act also toughens penalties on those who use illegal guns, requires recertification of firearm permits every five years, and strengthens the state’s ban on high-capacity magazines and assault weapons. NY SAFE Act: Introduction for Mental Health Providers, N.Y. OFFICE OF MENTAL HEALTH (Mar. 12, 2013), http://www.omh.ny.gov/omhweb/safe_act/nysafe.pdf, archived at <http://perma.cc/W5VB-85G8>.

³⁷ Carolyn Reinach Wolf, *NY Gun Control Bill: A Missed Opportunity to Address Mental Health Issues*, HUFFINGTON POST (Jan. 22, 2013, 1:24 PM), http://www.huffingtonpost.com/carolyn-reinach-wolf/mental-health-new-york-gun-control_b_2506727.html, archived at <http://perma.cc/QGK2-4SQS>.

³⁸ N.Y. MENTAL HYG. LAW § 9.46(b) (McKinney Supp. 2014).

³⁹ *Id.* § 9.46(a).

⁴⁰ *Id.* § 9.46(b).

⁴¹ N.Y. MENTAL HYG. LAW §§ 9.01(a), (b) (McKinney 2011).

⁴² New York Secure Ammunition and Firearms Enforcement (SAFE) Act, 2013 N.Y. Sess. Laws 1 (McKinney) (adding § 9.46 to the Mental Hygiene Law).

⁴³ Curtis Skinner, *SAFE Act Registry of Mentally Ill Nets Few Gun Permit Holders*, THE NEW YORK WORLD (June 3, 2013), <http://www.thenewyorkworld.com/2013/06/03/safe-act-registry/>, archived at <http://perma.cc/RZ9R-5HS4> (quoting Beth Haroules, senior staff

In an attempt to improve public safety, the SAFE Act created a statewide database of firearms license holders maintained by the New York State Police, which uses the database to determine whether a particular individual is qualified to possess a firearm.⁴⁴ Through this provision, individuals who are the subject of a mental health professional's determination that they are likely to engage in dangerous behavior are disqualified.⁴⁵ The SAFE Act amends the Mental Hygiene Law to require the Office of Mental Health (OMH) and the Office for People with Developmental Disabilities (OPWDD) to transmit the information that is being submitted to the federal database⁴⁶ to the New York Division of Criminal Justice Services (DCJS) to determine whether a person possesses a firearms license, and if so, suspend or revoke that license.⁴⁷ The person must then surrender their license and all firearms;⁴⁸ if they do not, the police are authorized to remove such weapons.⁴⁹

Lastly, the SAFE Act expands New York State's Assisted Outpatient Treatment (AOT) law, known as Kendra's Law,⁵⁰ which allows courts to order individuals who have a history of noncompliance with treatment to receive mental health services and treatment while living in the community (instead of commitment to a psychiatric facility).⁵¹ For example, the SAFE Act extends the duration of the initial court order of AOT from six months to one year⁵² and extends the AOT law until June 30, 2017.⁵³

attorney at the New York Civil Liberties Union) (internal quotation marks omitted).

⁴⁴ OFFICE OF DIV. COUNSEL, N.Y. STATE POLICE, GUIDE TO THE NEW YORK SAFE ACT FOR MEMBERS OF THE DIVISION OF STATE POLICE 1 (Sept. 2013), http://www.nypdcea.org/pdfs/NYSP_Safe_Act_Field_Guide.pdf, archived at <http://perma.cc/QH6G-EMA4>.

⁴⁵ *Id.* at 2.

⁴⁶ The National Instant Criminal Background Check System (NICS) was created under the Brady Handgun Violence Prevention Act of 1993 to inform Federal Firearms Licensees as to whether they could proceed with a firearm sale. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.).

⁴⁷ N.Y. MENTAL HYG. LAW § 9.46 (McKinney Supp. 2014).

⁴⁸ *Id.*

⁴⁹ NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, NYS OFFICE OF MENTAL HEALTH, NEW YORK SECURE AMMUNITION AND FIREARMS ENFORCEMENT ACT (NY SAFE ACT), GUIDANCE DOCUMENT 2, http://omh.ny.gov/omhweb/safe_act/guidance.pdf, archived at <http://perma.cc/J4GQ-ZVS3>.

⁵⁰ N.Y. MENTAL HYG. LAW § 9.60 (McKinney Supp. 2014).

⁵¹ *Assisted Outpatient Treatment Laws*, TREATMENT ADVOCACY CTR., <http://www.treatmentadvocacycenter.org/solution/assisted-outpatient-treatment-laws> (last visited Sept. 6, 2014), archived at <http://perma.cc/RL9-78UR>. Today, forty-five states permit the use of AOT. *Id.*

⁵² New York Secure Ammunition and Firearms Enforcement (SAFE) Act, 2013 N.Y. Sess. Laws 1 (McKinney) (amending MENTAL HYG. § 9.60(j)(2)).

⁵³ MENTAL HYG. § 9.60.

There are several issues with the reporting requirement and the attempted expansion of AOT. The concerns of medical and mental health professionals with respect to the reporting requirements in the new gun control legislation are discussed further in Part IV.⁵⁴ As for the problems with the AOT expansion, the SAFE Act did not provide for increased funding to effectuate this expansion. An AOT order must include care coordination through the use of case management or Assertive Community Treatment (ACT) teams.⁵⁵ Other possible components of an AOT order include alcohol or substance abuse counseling, blood or urinalysis testing for alcohol or illegal substances, medication management, and supportive housing.⁵⁶ Without proper funding, the SAFE Act's expansion of AOT is unlikely to be implemented successfully. It seems that New York's reactionary gun control legislation is in need of major and realistic reform.

B. ILLINOIS

Illinois also recently passed legislation to make it easier to prevent those with severe mental illness from purchasing a gun,⁵⁷ but avoided addressing the underlying need for reformation of the flawed mental health system. The Firearm Concealed Carry Act was passed in July 2013 and went into effect in January 2014.⁵⁸ A provision contained within this legislation, the Firearm Owner Identification (FOID) Mental Health Reporting System, tightens the requirements of criminal and mental health background checks on applicants.⁵⁹

Additionally, and analogous to New York's system, some mental health practitioners are required under the new law to report potentially dangerous patients, which may harm doctor-patient trust.⁶⁰ Specifically, physicians, clinical psychologists, and qualified examiners⁶¹ must report

⁵⁴ See *infra* Part IV.

⁵⁵ MENTAL HYG. § 9.60(a)(1).

⁵⁶ *Id.*

⁵⁷ Firearm Concealed Carry Act, 430 ILL. COMP. STAT. ANN. § 66 (West 2014); Bonnie Miller Rubin & Dahleen Glanton, *State Grapples with Keeping Guns from Mentally Ill*, CHI. TRIB., Sept. 29, 2013, §1 at 4.

⁵⁸ § 66; Rubin & Glanton, *supra* note 57.

⁵⁹ Press Release, Ill. Dep't of Human Servs., Clarifies Who Must Report Dangerous Activity and What Constitutes "Clear and Present Danger" (Jan. 13, 2014), <http://www.dhs.state.il.us/page.aspx?item=69194&newssidebar=27893>, archived at <http://perma.cc/Y88Y-H9AD> (stating that this online system is administered by the Illinois Department of Human Services).

⁶⁰ Rubin & Glanton, *supra* note 57.

⁶¹ Qualified examiners include clinical social workers, registered nurses, licensed clinical professional counselors, and licensed marriage and family therapists. 405 ILL. COMP. STAT. ANN. § 5/1-122 (West 2011).

patients determined to pose “a clear and present danger”⁶² or to be developmentally disabled⁶³ to the Illinois Department of Human Services (IDHS).⁶⁴ The IDHS then cross-references the reported individuals with the Department of State Police FOID database and reports any matches to the police.⁶⁵ The Act grants the police the authority to deny an application for a FOID card or revoke and seize a FOID card.⁶⁶ It seems this system was created with the intention of reducing gun violence by taking guns away from the mentally ill. The system as it stands, however, compromises doctor–patient confidentiality and directly associates mental illness with violence.⁶⁷

C. OTHER STATE GUN CONTROL POLICIES

While federal lawmakers failed to make any progress,⁶⁸ several states passed gun control bills with the goal of preventing gun violence.⁶⁹ For

⁶² “Clear and present danger” is defined as “a person who . . . communicates a serious threat of physical violence against a reasonably identifiable victim or poses a clear and imminent risk of serious physical injury to himself, herself, or another person.” Firearm Owners Identification Card Act, 430 ILL. COMP. STAT. ANN. § 65/1.1 (West 2014).

⁶³ *Id.* § 65/8.1(d)(1).

⁶⁴ *Id.*

⁶⁵ *Id.* § 65/8.1(c)–(d). To possess or purchase firearms or ammunition, Illinois residents must have a FOID card, which is issued by the Illinois State Police. *Id.* § 65/2.

⁶⁶ *Id.* § 65/8.

⁶⁷ See *infra* Part III (discussing concerns of medical and mental health professionals when it comes to the reporting requirements in new gun control legislation).

⁶⁸ There was not a single federal law passed in the year after the shooting at Sandy Hook Elementary School that was aimed at gun violence prevention, including legislation to expand background checks. Lindsey Boerma, *One Year After Newtown, Congress Still Stalled on Gun Control*, CBS NEWS (Dec. 14, 2013, 7:02 AM), <http://www.cbsnews.com/news/one-year-after-newtown-congress-still-stalled-on-gun-control/>, archived at <http://perma.cc/4BRY-FVED>. In April 2013, the Senate blocked a plan to expand background checks as well as several other gun control measures. Jonathan Weisman, *Gun Control Drive Blocked in Senate; Obama, in Defeat, Sees ‘Shameful Day’*, N.Y. TIMES, Apr. 18, 2013, at A1. President Barack Obama referred to this failure as “a pretty shameful day for Washington.” *Id.*

⁶⁹ Maggie Clark, *Year After Newtown, Many States Have Made Changes in Gun Laws*, USA TODAY (Dec. 13, 2013, 4:03 PM), <http://www.usatoday.com/story/news/nation/2013/12/13/stateline-newtown-gun-control-mental-health/4009051/>, archived at <http://perma.cc/9DY8-FH73>. For example, Connecticut passed new gun control measures, among the strictest in the nation, shortly after Adam Lanza killed twenty children and six adults at Sandy Hook Elementary School in Newtown, Connecticut. Ellen Wulforst, *Judge Upholds Connecticut Gun Control Law Passed After Newtown Shootings*, REUTERS (Jan. 30, 2014, 9:57 PM), <http://www.reuters.com/article/2014/01/31/us-usa-guncontrol-connecticut-idUSBREA0U06H20140131>, archived at <http://perma.cc/8SJ7-PBV2>. See also Karen Yourish et al., *State Gun Laws Enacted in the Year Since Newtown*, N.Y. TIMES (Dec. 10, 2013), <http://www.nytimes.com/interactive/2013/12/10/us/state-gun-laws-enacted-in-the->

example, Colorado,⁷⁰ Connecticut,⁷¹ Delaware,⁷² Maryland,⁷³ Nevada,⁷⁴ New Jersey,⁷⁵ and New York⁷⁶ “now require background checks for all gun purchases in person or online, including at gun shows.”⁷⁷ Even states with historically weak gun laws, such as Florida,⁷⁸ Missouri,⁷⁹ and Texas,⁸⁰ took action to strengthen their gun control laws in 2013. These states and many others adopted new gun control provisions or laws with varying degrees of consequences for the mental health world.

year-since-newtown.html, *archived at* <http://perma.cc/SD4K-6ESS>.

⁷⁰ Colorado requires background checks for all sales at gun shows. COL. REV. STAT. § 12-26.1-101 (2013).

⁷¹ Connecticut requires background checks for all gun, ammunition, and magazine sales. CONN. GEN. STAT. ANN. § 29-361 (West 2013).

⁷² Delaware requires background checks for all private gun sales. DEL. CODE ANN. tit. 11, § 1448A(a) (Supp. 2012).

⁷³ Maryland requires applicants for handgun licenses to submit fingerprints to the state police. MD. CODE ANN., PUB. SAFETY § 5-118 (LexisNexis 2012); *Handgun Qualification License*, DEP'T OF MD. STATE POLICE, <https://www.mdsp.org/Organization/SupportServicesBureau/LicensingDivision/MainLicensingPage/LicensingandRegistration/Firearms/HandgunQualificationLicense.aspx> (last visited August 29, 2014), *archived at* <http://perma.cc/G5LD-A7MK>.

⁷⁴ Licensed firearms dealers in Nevada must process each sale or transfer through the Nevada Department of Public Safety “Brady Point of Sale Program.” *See* Background Checks in Nevada, *available at* <http://smartgunlaws.org/background-checks-in-nevada/>, *archived at* <http://perma.cc/L855-DA9X>. Further, Nevada allows private individuals to request a background check before transferring a firearm. NEV. REV. STAT. § 202.254 (LexisNexis Supp. 2013).

⁷⁵ New Jersey requires background checks prior to issuing a permit for all firearms sales. N.J. STAT. ANN. § 2C:58-3 (West Supp. 2014).

⁷⁶ New York requires background checks for all private gun sales. N.Y. GEN. BUS. LAW § 898 (McKinney Supp. 2014); N.Y. PENAL LAW § 400.00 (McKinney Supp. 2014).

⁷⁷ Clark, *supra* note 69.

⁷⁸ Florida expanded existing state law to restrict anyone who is voluntarily committed for treatment from purchasing a gun. FLA. STAT. ANN. § 790.065(2)(a)(4)(b)(II) (West Supp. 2014); *Florida Mental Illness Gun Control Bill Passes*, HUFFINGTON POST (Apr. 30, 2013, 3:37 PM), http://www.huffingtonpost.com/2013/04/30/florida-guns-mentally-ill_n_3187474.html, *archived at* <http://perma.cc/N3V3-3E6Q>. Now those individuals will be reported to Florida’s Mental Competency Database (MECOM) and to the NICS. *Id.* Previously, only those individuals who were involuntarily committed under Florida’s Baker Act were prohibited from purchasing a gun. *Id.*

⁷⁹ Missouri requires background checks for concealed-carry permit applicants. MO. ANN. STAT. § 571.101 (West Supp. 2014).

⁸⁰ S.B. 1189, 83d Leg. Reg. Sess. (Tex. 2013). Texas has implemented new regulations that allow law enforcement to confiscate weapons from individuals in mental health crisis situations. Dan Freedman, *State Revises Mental Crisis Policy*, HOUS. CHRON., Oct. 19, 2013, at A1. Texas law states that police cannot give a seized weapon back to the individual if he or she has had court-ordered in-patient psychiatric treatment. *Id.*

The sad truth is that none of the recently enacted state gun laws will likely prevent major acts of gun violence. For example, the mental health professionals who examined Adam Lanza⁸¹ said he was not a risk to himself or to others.⁸² Further, Lanza used guns and ammunition purchased legally by his mother.⁸³ Aaron Alexis⁸⁴ was never convicted of a crime or involuntarily committed to a psychiatric hospital, both of which might have led to his name being entered into a federal database.⁸⁵ Instead of developing new legislation focused on keeping guns out of the hands of those with mental illness, legislation should call for increased funding and awareness of mental health issues that will help identify, intervene, evaluate, and oversee the mentally ill. Being proactive and preventive means a greater possibility of treatment, recovery and stability for those individuals suffering from a mental illness.

III. CONCERNS OF MEDICAL AND MENTAL HEALTH PROFESSIONALS

A. BARRIERS TO SEEKING TREATMENT

Recent gun control legislation creates a barrier to participation in counseling and treatment and further stigmatizes those suffering from a mental illness. Instead of focusing on treatment and recovery, new gun control legislation asks mental health professionals to predict which patients may act on their violent thoughts.⁸⁶ This type of legislation adds to the negative stereotype that individuals with mental illness are more prone to violence. For the most part, medical and mental health practitioners are frustrated with recent attempts to legislate gun restrictions and sweep in mental illness.⁸⁷

⁸¹ See Barron, *supra* note 2.

⁸² Clark, *supra* note 69.

⁸³ *Id.*

⁸⁴ See Shear & Schmidt, *supra* note 3.

⁸⁵ See 18 U.S.C. § 922(d)(4) (2012) (prohibiting the sale of firearms to certain individuals with a history of mental illness); *id.* § 922(t)(1)(A) (requiring licensed dealers to request a background check prior to transfer of a firearm); Rubin & Glanton, *supra* note 57.

⁸⁶ Dinah Miller, *Gun Control and Mandatory Reporting of Dangerous Patients*, PSYCHOL. TODAY (Jan. 22, 2013) <http://www.psychologytoday.com/blog/shrink-rap-today/201301/gun-control-and-mandatory-reporting-dangerous-patients>, archived at <http://perma.cc/XG9H-68S7>. See, e.g., N.Y. MENTAL HYG. LAW § 9.46(b) (McKinney Supp. 2014) (requiring mental health professionals to report to the director of community services when such professionals “determine[], in the exercise of reasonable professional judgment, that [a patient] is likely to engage in conduct that would result in serious harm to self or others”).

⁸⁷ See Malcolm Ritter & Lindsey Tanner, *Mental Health Experts Worry New York Gun Laws May Discourage Proper Treatment*, HUFFINGTON POST (Jan. 15, 2013, 1:20 PM), http://www.huffingtonpost.com/2013/01/15/mental-health-experts-new-york-gun-law_n_

B. THREATENING THE DUTY OF CONFIDENTIALITY

New gun control laws that contain provisions requiring certain mental health professionals to report patients to the state, such as the New York SAFE Act, are quite troubling. “The duty of confidentiality between a doctor and patient is one of the core guiding principles of the practice of medicine.”⁸⁸ In order to effectively treat individuals with mental illness, patients must trust that any “disclosure of their inner thoughts and feelings[—]including anger, hostilities, and resentments”—is kept confidential.⁸⁹ This type of reporting requirement amounts to an invasion of patient privacy, forcing the professional to break a perceived bond of confidentiality and causing a “chilling effect” on those seeking help.⁹⁰

The mental health reporting requirements recently passed by many state legislatures⁹¹ threaten doctor–patient trust; patients may fear that their openness will lead to a report to a federal or state database and may jeopardize their current or future employment and gun license.⁹² This directly impacts the formation of a doctor–patient relationship and may cut off the mentally ill from the social support and medical or mental health care that is necessary for their recovery.⁹³ This type of legislation may have the unintended consequence of reducing the number of individuals who seek treatment, which, in turn, could result in an increase of the occurrence

2480508.html, archived at <http://perma.cc/K458-M5HF>; see also *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, archived at <http://perma.cc/65G8-8XM6>.

⁸⁸ Press Release, N.Y. State Psychiatric Ass’n, NYSPA Issues Press Release on SAFE Act Reporting Requirements, http://www.nyspsych.org/index.php?option=com_content&view=article&id=53:safe-act-press-release&catid=20:site-content, archived at <http://perma.cc/C247-VL9Q>. See COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS’N, CODE OF MEDICAL ETHICS § 5.05 (2007). See also AM. MED. ASS’N, PRINCIPLES OF MEDICAL ETHICS § 4 (2001), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page>, archived at <http://perma.cc/HE3V-65HC> (“A physician shall . . . safeguard patient confidences and privacy within the constraints of the law.”).

⁸⁹ Press Release, N.Y. State Psychiatric Ass’n, *supra* note 88.

⁹⁰ Jeffrey Swanson, *Mental Illness and New Gun Law Reforms: The Promise and Peril of Crisis-Driven Policy*, 309 JAMA 1233, 1233 (2013).

⁹¹ See LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 30.

⁹² Tamer El-Ghobashy, *Law’s Mental-Health Provision Draws Ire*, WALL ST. J., Jan. 16, 2013, at A17; Robert David Jaffee, *Gun-Control Laws Could Have Chilling Effect on Psychiatric Treatment*, HUFFINGTON POST (Jan. 18, 2013, 12:08 PM), http://www.huffingtonpost.com/robert-david-jaffee/gunc-ontrol-laws-mental-illness_b_2492054.html, archived at <http://perma.cc/FRQ9-6Z45>.

⁹³ Ritter & Tanner, *supra* note 87 (quoting Dr. Paul Appelbaum, Columbia University) (stating that people who need treatment may not report their “disturbing impulses” or may not seek treatment at all).

of suicide or violence.⁹⁴ Treatment is an essential piece of recovery from a mental illness, and new mental health reporting systems pose “one more obstacle” to obtaining such treatment.⁹⁵

There are reporting rules already in place whereby mental health professionals do not have to potentially break a bond of trust. For example, “[m]ental-health professionals already have an ethical obligation to respond to threats of violence, such as warning potential victims of possible threats.”⁹⁶ The common law duty to warn was initially articulated in a 1976 California Supreme Court case, *Tarasoff v. Regents*.⁹⁷ The *Tarasoff* court held that when a mental health professional determines that a patient poses a serious danger of violence to another individual, the professional has an “obligation to use reasonable care to protect the intended victim against such danger.”⁹⁸ Since 1976, “duty to warn” statutes were adopted in most jurisdictions and have expanded to include a wide variety of health care practitioners.⁹⁹ Unlike the permissive *Tarasoff* duty to warn, recent gun control laws, such as the New York SAFE Act, mandate reporting and allow for police to remove an individual’s firearms.¹⁰⁰ The new mandatory reporting laws in many states require clinicians to break confidentiality before exhausting clinical remedies.¹⁰¹ While new gun control legislation may enhance public safety, it comes at a price: creating another barrier for those pursuing treatment.

C. ALIENATING THOSE WHO NEED TREATMENT

The stigma associated with mental illness is prevalent among the individuals who suffer from a mental illness as well as among the general

⁹⁴ Miller, *supra* note 86.

⁹⁵ Tina Sfondeles & Monifa Thomas, *Proposed Gun Laws Could Stigmatize Mental Illness, Advocates Fear*, CHI. SUN-TIMES (Mar. 27, 2013, 3:28 PM), <http://www.suntimes.com/18256919-761/gun-laws-could-fuel-mental-health-stigma-advocates-fear.html#U33tYFhdV7o>, archived at <http://perma.cc/NR8Y-9SC9> (quoting Dr. Paul S. Applebaum, Columbia University).

⁹⁶ El-Ghobashy, *supra* note 92.

⁹⁷ *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

⁹⁸ *Id.* at 340. The professional can fulfill that duty by notifying police that an individual may be in danger, warning the potential victim, or by taking other reasonable steps to protect the threatened individual. *Id.*

⁹⁹ Fillmore Buckner & Marvin Firestone, “*Where the Public Peril Begins*”: 25 Years After *Tarasoff*, 21 J. LEGAL MED. 187, 187 (2000).

¹⁰⁰ *Mental Health Professionals’ Duty to Protect/Warn*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 2013), <http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx>, archived at <http://perma.cc/47J-3G2H>.

¹⁰¹ El-Ghobashy, *supra* note 92.

population.¹⁰² The stigma adversely affects the mentally ill individual's "pursuit of treatment, employment and income, self-worth, and family."¹⁰³ Many individuals suffering from a mental illness report that the way in which other people judge them is "one of their greatest barriers to a complete and satisfying life."¹⁰⁴ An individual's willingness to comply with treatment is adversely affected by the stigma associated with having a mental illness. Stigma affects self-esteem, social functioning, and willingness to comply with medications.¹⁰⁵ To further compound the negative stereotype, mental illness is commonly associated with violence.¹⁰⁶ Stigma has led to fear, prejudice, and discrimination toward individuals suffering from a mental illness.¹⁰⁷

The negative portrayal of mental illness in the media exacerbates the misinformation about mental illness available to the public¹⁰⁸ and contributes to the fact that stigma is "the most formidable obstacle to future progress in the arena of mental illness."¹⁰⁹ Media coverage often solidifies the mistaken belief that these individuals should be avoided or feared due to their propensity for violence and unpredictability.¹¹⁰ Pictures of James Holmes with his hair dyed orange;¹¹¹ Jared Loughner's mugshot grin;¹¹² and

¹⁰² Aviv Shamash, *A Piecemeal, Step-by-Step Approach Toward Mental Health Parity*, 7 J. HEALTH & BIOMEDICAL L. 273, 273–74 (2011).

¹⁰³ DAVID WHALEN, CANADIAN MENTAL HEALTH ASS'N, THE STIGMA ASSOCIATED WITH MENTAL ILLNESS 2, <http://www.cmhanl.ca/pdf/Stigma.pdf>, archived at <http://perma.cc/6NX3-W3NR>; see also Bruce G. Link et al., *The Consequences of Stigma for the Self-Esteem of People with Mental Illnesses*, 52 PSYCHIATRIC SERVICES 1621, 1621 (2001) (finding that the stigma of mental illness can lead to a significant loss of self-esteem as well as discrimination in the workplace).

¹⁰⁴ *Stigma and Discrimination*, CANADIAN MENTAL HEALTH ASS'N, <http://ontario.cmha.ca/mental-health/mental-health-conditions/stigma-and-discrimination/> (last visited Sept. 6, 2014), archived at <http://perma.cc/WFR2-R6VX>.

¹⁰⁵ Deborah A. Perlick, *Special Section on Stigma as a Barrier to Recovery: Introduction*, 52 PSYCHIATRIC SERVICES 1613, 1613 (2001).

¹⁰⁶ Maria A. Morrison, *Changing Perceptions of Mental Illness and the Emergence of Expansive Mental Health Parity Legislation*, 45 S.D. L. REV. 8, 9 (2000).

¹⁰⁷ *Id.*; see also Michael J. Fitzpatrick, *How Shootings Stigmatize People Living with Mental Illness*, NAT'L ALLIANCE ON MENTAL ILLNESS BLOG (Sept. 23, 2013), <http://blog.nami.org/2013/09/how-shootings-stigmatize-people-living.html>, archived at <http://perma.cc/9EKS-5LAX>.

¹⁰⁸ WHALEN, *supra* note 103, at 2.

¹⁰⁹ Perlick, *supra* note 105, at 1613 (quoting the Surgeon General's 1999 report on mental health) (internal quotation marks omitted).

¹¹⁰ CANADIAN MENTAL HEALTH ASS'N, *supra* note 104.

¹¹¹ Erica Goode et al., *Before Gunfire, Hints of 'Bad News'*, N.Y. TIMES, Aug. 27, 2012, at A1. On July 20, 2012, twenty-four-year-old James Holmes opened fire inside a movie theater in Aurora, Colorado, killing twelve people and injuring approximately fifty-nine. Dan Frosch & Kirk Johnson, *Gunman Kills 12 at Colorado Theatre; Scores Are Wounded*,

images of Seung-Hui Cho holding a gun to his head¹¹³ incite fear, rather than understanding. After the passage of the NY SAFE Act in January 2013, New York Governor Andrew Cuomo said “people who have mental health issues should not have guns . . . they could hurt themselves. They could hurt other people.”¹¹⁴ Statements like this, especially made by individuals in a position of power, add to the misconception that all individuals with a mental illness are violent.

The truth is that mental illness is not a major risk factor when it comes to potential for violence.¹¹⁵ In fact, the U.S. Surgeon General has found that “the overall contribution of mental disorders to the total level of violence in society is exceptionally small.”¹¹⁶ Most individuals suffering from mental illness are more often victims of violence than perpetrators.¹¹⁷ However, if an individual suffering from mental illness is aggressive or violent, treating that individual significantly decreases any potential for violence.¹¹⁸ Treatment—such as the use of antipsychotic medications or court-ordered assisted outpatient treatment—has resulted in the reduction of aggressive behavior or violence.¹¹⁹ By stigmatizing mental illness and associating it

Reviving Debate, N.Y. TIMES, July 21, 2012, at A1; Jack Healy, *Death Penalty Is Sought in Shooting at Theater*, N.Y. TIMES, April 2, 2013, at A13.

¹¹² See generally Dan Barry, *Looking Behind the Mug-Shot Grin*, N.Y. TIMES, Jan. 16, 2011, at A1.

¹¹³ ‘*This Is Where It All Ends. End of the Road.*’ *Chilling Words Before the Slaughter*, MAILONLINE.COM (Apr. 19, 2007, 5:19 PM), <http://www.dailymail.co.uk/news/article-449448/This-ends-End-road-Chilling-words-slaughter.html>, archived at <http://perma.cc/3Q5N-C3ZE>. Please be advised that most news sources have removed this image from their websites. On April 16, 2007, Seung-Hui Cho, a senior at Virginia Tech, shot and killed thirty-two people and wounded seventeen others before committing suicide. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 5 (2007), available at <http://www.washingtonpost.com/wp-srv/metro/documents/vatechreport.pdf>, archived at <http://perma.cc/5WB-TC4W>. At the time, this massacre was the deadliest shooting incident by a single gunman in U.S. history. Christine Hauser & Anahad O’Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES (Apr. 16, 2007), <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html?pagewanted=all>, archived at <http://perma.cc/S8LK-D4XP>.

¹¹⁴ Elizabeth Flock, *Gun Control Debate Clouds Definition of Mentally Ill*, U.S. NEWS & WORLD REP. (Apr. 3, 2013, 5:26 P.M.), <http://www.usnews.com/news/articles/2013/04/03/gun-control-debate-clouds-definition-of-mentally-ill>, archived at <http://perma.cc/DTE3-KQZ3>.

¹¹⁵ Rueve & Welton, *supra* note 9, at 36.

¹¹⁶ U.S. PUB. HEALTH SERV., DEP’T OF HEALTH & HUMAN SERVS., MENTAL HEALTH 7 (1999), available at <https://ia601801.us.archive.org/0/items/mentalhealthrepo00unit/mentalhealthrepo00unit.pdf>, archived at <http://perma.cc/9UNK-SCY5>.

¹¹⁷ HONBERG ET AL., *supra* note 12, at 2.

¹¹⁸ E. Fuller Torrey, *Stigma and Violence: Isn’t It Time to Connect the Dots?*, SCHIZOPHRENIA BULLETIN 1 (June 7, 2011), <http://schizophreniabulletin.oxfordjournals.org/content/early/2011/06/04/schbul.sbr057.full.pdf>, archived at <http://perma.cc/Y88A-G5J7>.

¹¹⁹ *Id.* at 2.

with violence, we are depriving many individuals of the opportunity to participate in treatment and improve their quality of life.

For individuals with mental illness to recover, meaning “live, work, learn and participate fully in their communities,”¹²⁰ those individuals must receive treatment and support. This means that as a society, we should be more accepting and respectful of those individuals suffering from a mental illness. Education and raising awareness about mental illness is possibly the best way to reduce stigma and increase understanding.¹²¹ Evidence shows that individuals who are well informed about mental illness are less likely to stigmatize the mentally ill.¹²² Preventing discrimination is equally important; we should not discriminate against those with mental illness when it comes to housing,¹²³ employment,¹²⁴ or education.¹²⁵ Stigma against individuals with mental illness prevents many of them from seeking treatment and denies them access to the support systems they need to recover.¹²⁶

IV. IMPROVING THE FLAWED MENTAL HEALTH SYSTEM

When reflecting on the recent tragic events in the United States involving gun violence, it seems that the gaps in the nation’s mental health

¹²⁰ SAGINAW CNTY. CMTY. MENTAL HEALTH AUTH., OVERCOMING THE STIGMA OF MENTAL ILLNESS 4, available at https://www.sccmha.org/anti-stigma/sccmha%201in5_wbrg.pdf (last visited Sept. 6, 2014), archived at <http://perma.cc/DV4-J473>.

¹²¹ WHALEN, *supra* note 103, at 4.

¹²² David L. Penn & Shannon M. Couture, *Strategies for Reducing Stigma Toward Persons with Mental Illness*, 1 WORLD PSYCHIATRY ASS’N 20, 20 (2002).

¹²³ “[T]he stigma related to housing [is] labelled as ‘Not in My Back Yard,’” meaning that residents of a community may wish to exclude mentally ill individuals from moving into their community. WHALEN, *supra* note 103, at 2.

¹²⁴ Individuals suffering from a mental illness may have difficulties securing employment, lose respect or responsibility, or experience a lack of opportunity to advance in the workplace. Elaine Brohan & Graham Thornicroft, *Stigma and Discrimination of Mental Health Problems: Workplace Implications*, 60 OCCUPATIONAL MED. 414, 414 (2010).

¹²⁵ Higher education administrators often take harsh disciplinary action against students with mental illness. Kim Lachance Shandrow, *Discrimination Against Students with Mental Health Issues on the Rise*, HEALTHCENTRAL, <http://www.healthcentral.com/depression/news-210912-5.html> (last visited Sept. 6, 2014), archived at <http://perma.cc/LQ88-ADLZ>. Students may be forced to leave campus after seeking help for mental health issues rather than being offered counseling and treatment. *Id.* Schools fear violent outbursts and liability issues. *Id.* Furthermore, many higher education settings do not have sufficient funding or services available, both of which are necessary to treat students with mental health issues, forcing students to drop out. DARCY GRUTTADARO & DANA CRUDO, NAT’L ALLIANCE ON MENTAL ILLNESS, COLLEGE STUDENTS SPEAK: A SURVEY REPORT ON MENTAL HEALTH 8, 12–18 (2012), available at https://www.nami.org/Content/NavigationMenu/Find_Support/NAMI_on_Campus1/collegereport.pdf, archived at <http://perma.cc/4GXN-S3DF>.

¹²⁶ CANADIAN MENTAL HEALTH ASS’N, *supra* note 104.

system, rather than loose gun laws, are to blame. Gun legislation is not effective at keeping guns out of the hands of a dangerous individual before an act of violence occurs,¹²⁷ and the mental health system has failed to identify those individuals who are a danger to themselves or others. Many Americans simply are not getting the mental health care that they need,¹²⁸ a sad truth that is only exacerbated by budget cuts and closings of mental health facilities. A better solution is to (1) amend current state mental health laws to increase funding and provide more readily accessible and comprehensive mental health services; (2) offer community programs and preventive training to allow for early interventions; and (3) fix the flaws in the federal and state background check systems.

A. ALLOCATING RESOURCES AND INCREASING ACCESS TO SERVICES FOR MENTAL HEALTH TREATMENT AT THE STATE LEVEL

While strengthening gun laws is an important piece of reducing gun violence, the bigger issue is the need for funding of mental health treatment and the need for increased access to such services. However, and quite shockingly, states have made significant budget cuts to mental health programs and resources over the past several years.¹²⁹ From fiscal year 2009 through 2012, states cut mental health budgets by a combined amount

¹²⁷ See *supra* notes 81–85 and accompanying text. Further, and more recently, on May 23, 2014, Elliot Rodger, a twenty-two-year-old male, killed six people and wounded thirteen before committing suicide in Santa Barbara County, California. Paul M. Barrett, *Santa Barbara Massacre Defies Gun Control, Mental Health Proposals: 4 Blunt Points*, BLOOMBERG BUSINESSWEEK (May 27, 2014), <http://www.businessweek.com/articles/2014-05-27/santa-barbara-massacre-defies-gun-control-mental-health-proposals-4-blunt-points>, archived at <http://perma.cc/3X72-3UC3>. Despite the fact that California has “some of the toughest gun-control laws in the country,” Rodger was able to purchase the guns used in this shooting, passing all background checks. *Id.*

¹²⁸ Many American adults cannot afford the cost of care, do not know where to go for services, worry about the community having a negative opinion, or do not want others to find out, or fear the possible negative effect on one’s job. Sy Mukherjee, *Study: Americans Just Can’t Afford Mental Health Treatment*, THINK PROGRESS (Jan. 24, 2013 4:50 PM) <http://thinkprogress.org/health/2013/01/24/1489091/americans-just-cant-afford-mental-health-treatment/#>, archived at <http://perma.cc/VDT2-ZPYZ>.

¹²⁹ Nicole Fisher, *Mental Health Loses Funding as Government Continues Shutdown*, FORBES (Oct. 10, 2013, 12:06 PM), <http://www.forbes.com/sites/theapothecary/2013/10/10/mental-health-loses-funding-as-government-continues-shutdown/>, archived at <http://perma.cc/KCT9-Z35Z>. “According to the National Alliance on Mental Illness (NAMI), California cut its mental health budget by \$587.4 million between 2009 and 2011, New York by \$132 million, and Illinois by \$113.7 million.” Michael Ollove, *Easiest Path to Mental Health Funding May Be Medicaid Expansion*, STATELINE (Jan. 18, 2013), available at <http://www.kaiserhealthnews.org/stories/2013/january/18/state-mental-health-funding-medicaid.aspx>, archived at <http://perma.cc/89EQ-68BZ>.

of \$4.35 billion.¹³⁰ The services affected “include community and hospital-based psychiatric care, [supportive] housing, and access to medications.”¹³¹ For example, in Illinois, state budget cuts of approximately \$114 million between 2009 and 2011¹³² led to the closure of six of the twelve mental health clinics that existed in Chicago.¹³³ These budget cuts, in Illinois and around the country, eliminate essential services to those with mental illness.

Reducing the availability of necessary programs and support services can worsen conditions and have an adverse effect on communities around the country.¹³⁴ Cutting mental health budgets so drastically forces individuals with mental illness to overwhelm emergency rooms, community hospitals, homeless shelters, and correctional facilities.¹³⁵ The costs of emergency treatment and the use of law enforcement personnel and resources will force states to spend more money in the long run.¹³⁶ Individuals suffering from a mental illness need increased access to and funding for AOT, outpatient treatment programs, residential treatment programs, psychiatric case management, and appropriate psychiatric housing, among others.

Access to adequate mental health services and compliance with court-ordered treatment are essential components of the recovery process. Aaron Alexis was exhibiting signs of mental illness for many years leading up to the tragic shooting;¹³⁷ he is a prime example of an individual with a mental illness who was living in the community, but not receiving adequate community-based mental health services. If Alexis’s red flag behaviors were identified and treated—perhaps after one of his multiple run-ins with the law and naval officials¹³⁸—the shooting at the Navy Yard could have

¹³⁰ Maciag, *supra* note 14.

¹³¹ HONBERG ET AL., *supra* note 12, at 1.

¹³² Monifa Thomas, *States Make Deep Cuts in Mental Health Funding*, CHI. SUN-TIMES (Mar. 12, 2011), <http://www.suntimes.com/news/metro/4224421-418/states-make-deep-cuts-in-mental-health-funding.html>, *archived at* <http://perma.cc/MHF9-UNAC>.

¹³³ Fisher, *supra* note 129.

¹³⁴ HONBERG ET AL., *supra* note 12, at 4 (stating that the consequences of decreased funding and services “include frequent visits to emergency rooms, hospitalizations, homelessness, entanglement with juvenile and criminal justice systems, . . . premature deaths and suicides”).

¹³⁵ *Id.* at 1.

¹³⁶ *See id.* at 8.

¹³⁷ *See* Ben Wolfgang, *Aaron Alexis’ History Renews Debate Between Mental Issues, Gun Crimes*, WASH. TIMES (Sept. 18, 2013), <http://www.washingtontimes.com/news/2013/sep/18/shooters-history-renews-debate-between-mental-issu/?page=all>, *archived at* <http://perma.cc/832Q-EQGU>. Alexis may have been suffering from post-traumatic stress disorder, as well as paranoia, hearing voices, and other issues. *Id.*

¹³⁸ Alexis was involved in two shooting incidents in 2004 and 2010 in Fort Worth, Texas and Seattle, Washington. Kevin Johnson et al., *Signs of Trouble, but Motive a Mystery*, USA

been prevented. Keeping people with mental illness in the community rather than in a more costly acute or long-term hospital care is a good idea in theory, but, in reality, there is insufficient planning, funding, and support for these community-based services and for oversight such as psychiatric case management.

Pennsylvania Representative Tim Murphy took a step in the right direction when he introduced legislation in December 2013 aimed at solving many of the problems raised by mental health professionals, individuals, and families suffering because of the broken mental health system.¹³⁹ The Helping Families in Mental Health Crisis Act of 2013 proposes increased funding for AOT programs and mental health courts as alternatives to inpatient hospitalization, among many other reforms.¹⁴⁰ Representative Murphy also tackled the privacy issues of the Health Information Portability and Accountability Act (HIPAA) and the Family Educational Rights and Privacy Act (FERPA).¹⁴¹ Specifically, Murphy proposed that caregivers should have access to the individual's "protected health information" or "certain education records" to protect the "health, safety, or welfare of such individual."¹⁴² This type of access, which enables family support, is crucial when it comes to recovery. With the proper community supports in place, individuals with mental illness will have an easier time transitioning from institutional settings to community-based care.¹⁴³

This country's obsession with gun control as the means of reducing violence has steered us off-track; we must focus on allocating funds for mental health services and increasing the availability of these services for the mentally ill. Individuals living with mental illness can, and often do,

TODAY, Sept. 17, 2013, at 3A.

¹³⁹ REP. TIM MURPHY, THE HELPING FAMILIES IN MENTAL HEALTH CRISIS ACT 1, available at <http://murphy.house.gov/uploads/Summary.pdf>, archived at <http://perma.cc/CR4Z-HGAV>.

¹⁴⁰ Helping Families in Mental Health Crisis Act of 2013, H.R. 3717, 113th Cong. § 705 (2013). Ron Hernberg & Andrew Sperling, NAT'L ALLIANCE ON MENTAL ILLNESS, MENTAL HEALTH LEGISLATION IN CONGRESS (2013) (describing NAMI's position on the Helping Families in Mental Health Crisis Act of 2013) available at http://www.nami.org/Content/Microsites275/NAMI_Greater_Orlando/Home263/Welcome_to_NAMIGO!1/NAMI_National_Email_MurphyMemoFinal.pdf, archived at <http://perma.cc/9QKU-6V5S>. Mental health courts provide an alternative to incarcerating the mentally ill such as community-based treatment. See also MURPHY, *supra* note 139, at 2–3.

¹⁴¹ The proposed bill will reform federal privacy laws that often prevent family members or "caregivers" from accessing their relative's medical records. H.R. 3717, *supra* note 140, at 44–48.

¹⁴² *Id.* at 44–46.

¹⁴³ Kim Williams, *Crucial Time for Change: NYS's Behavioral Health Care Transformation*, BEHAV. HEALTH NEWS, Spring 2014, at 16.

recover and gain independence.¹⁴⁴ However, these individuals need the proper support system. Individuals suffering from a mental illness, whether they are homeless, involved in the criminal justice system, or living in adult homes or nursing homes, must receive services that will focus on recovery and enhance their quality of life.¹⁴⁵

B. PREVENTATIVE TRAINING AND BEHAVIORAL INTERVENTION TEAMS IN EDUCATIONAL AND WORKPLACE COMMUNITIES

Too often, families, peers, or the community know of an individual who is experiencing psychiatric symptoms, but do not know how to react or help. On the other hand, family members, friends, or the community at large often fail to take notice of warning signs or red flags that forewarn of an act of violence.¹⁴⁶ In educational or workplace environments, it is problematic that managers, supervisors, human resource professionals, coworkers, administrators, faculty, and staff are often untrained in recognizing and preventing violence.¹⁴⁷ Providing these people with an education in conflict resolution, and in early recognition and management of escalating behavior or warning signs, is essential and should be mandatory. Furthermore, communities should offer support programs designed to educate families and the public about mental illness.¹⁴⁸ Overall, increased awareness and education “will lead to more effective, timely interventions that can prevent tragedies.”¹⁴⁹

Many school and workplace environments have already created Behavioral Intervention Teams (BIT),¹⁵⁰ a step in the right direction towards “preventing and ameliorating distress [in the workplace or] on

¹⁴⁴ Press Release, Substance Abuse and Mental Health Servs. Admin., Report Shows Community-Based Programs Improve the Lives of Young Adults with Mental Health Challenges (May 7, 2013, 9:30 AM), <http://www.samhsa.gov/newsroom/advisories/1305072158.aspx>, archived at <http://perma.cc/BDM9-BLKR>.

¹⁴⁵ *Id.* This may also include providing support to family members who house and care for individuals with mental illness. See *Mental Illness and the Family: Recognizing Warning Signs and How to Cope*, MENTAL HEALTH AMERICA, <http://www.mentalhealthamerica.net/recognizing-warning-signs> (last visited Sept. 6, 2014), archived at <http://perma.cc/65AY-HGQJ>.

¹⁴⁶ Stanley, *supra* note 13, at 877.

¹⁴⁷ See Stephen J. Romano et al., *Workplace Violence Prevention: Readiness and Response*, FBI L. ENFORCEMENT BULL., Jan. 2011, at 1, 5–6, available at <http://leb.fbi.gov/2011/january/leb-january-2011>, archived at <http://perma.cc/6T9M-J57L> (stating that those who have not been properly trained to deal with these stressful situations are often helpless when a crisis occurs).

¹⁴⁸ HONBERG ET AL., *supra* note 12, at 13.

¹⁴⁹ *Id.*

¹⁵⁰ *Our Vision*, NAT'L BEHAVIORAL INTERVENTION TEAM ASS'N, <http://nabita.org/about> (last visited Sept. 6, 2014), archived at <http://perma.cc/HH8Y-Z4MY>.

campus long before it escalates.”¹⁵¹ Whether in a school or workplace environment, a BIT is a group of trained professionals from different disciplines within an organization that discusses and evaluates behaviors of concern that could precede a violent event.¹⁵² The BIT “receives reports of disruptive, problematic or concerning behavior or misconduct [] from co-workers, community members, friends, colleagues,” or students, among others.¹⁵³ The overall purpose of a BIT is to gather information, investigate the allegations and possibly perform a threat assessment, define a plan or response, implement that response, and monitor the disposition of the case referred to it. The BIT may focus on assessing a threat that already exists or may focus on preventing a threat or crisis before it occurs.¹⁵⁴

Members of the BIT work together to identify early signs of a potential crisis, or “red flags,” rather than waiting for an impending threat and implementing an emergency response.¹⁵⁵ The team is made up of individuals with specialized knowledge, such as health professionals (psychologists/counselors), academic affairs administrators, managers or supervisors, legal counsel, consulting mental health counsel, and law enforcement personnel.¹⁵⁶ Interventions should incorporate the individual of concern, the educational administrators or workplace supervisors (when appropriate), other community resources, and the family (when appropriate) to support that individual.¹⁵⁷ Different interventions include engaging directly with the person, referring the individual for mental health assessment or treatment, mandating psychological assessment, hospitalizing the individual involuntarily for evaluation or treatment, taking disciplinary action, or notifying family members.¹⁵⁸ Every educational institution or workplace should have a BIT in place to mitigate risk and prepare for emergency situations.

¹⁵¹ JED FOUND., HIGHER EDUC. MENTAL HEALTH ALLIANCE, BALANCING SAFETY AND SUPPORT ON CAMPUS 32, http://www.jedfoundation.org/campus_teams_guide.pdf, *archived at* <http://perma.cc/TD5W-N32P>. *See also id.* at 3 (stating that the purpose of a BIT is to prevent instances of disturbing behavior from “falling through the organizational cracks” and to connect separate pieces of information that together may indicate a more serious problem).

¹⁵² *See Behavioral Intervention Teams*, NAT’L BEHAVIORAL INTERVENTION TEAM ASS’N, <http://nabita.org/behavioral-intervention-teams/> (last visited Sept. 6, 2014), *archived at* <http://perma.cc/AUV3-NDCA>.

¹⁵³ *Id.*

¹⁵⁴ However, none of this is possible if members of a campus community or workplace environment do not know that the BIT exists or how they can make a report to the team.

¹⁵⁵ *See* NAT’L BEHAVIORAL INTERVENTION TEAM ASS’N., *supra* note 152.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ JED FOUND., *supra* note 151, at 17.

To prevent dangerous situations, educational and workplace environments should have a system in place to connect small pieces of information that, together, may indicate a more serious problem. The BIT tracks red flag behaviors over time, which involves “detecting patterns, trends, and disturbances in individual or group behavior”¹⁵⁹ such as aggression, resentment, lack of motivation, performance issues, behavior issues, paranoia, interest in weapons, financial problems, and personal problems, among others.¹⁶⁰ The key to a successful BIT is communication. This means that departments across a college campus or within a workplace must communicate with each other when one of the above-mentioned concerning behaviors, or other disturbing behavior, occurs. Avenues must exist for students, staff, faculty, and employees to report concerning behaviors to their administrators or supervisors.¹⁶¹ Open communication between departments within an organization or school campus and with members of the campus or workplace community will contribute to the prevention of any particular instance of disturbing behavior from falling through the cracks.

The lack of information sharing on the Virginia Tech campus contributed to the failure of the university to identify Seung-Hui Cho as a potential threat of danger to himself and others and prevent the horrific tragedy of April 16, 2007.¹⁶² The Virginia Tech Police Department and Department of Residence Life knew that fellow students made complaints of stalking and unwanted communications against Cho on two separate occasions.¹⁶³ Cho’s parents knew of his history of mental illness and struggles at school, both of which started in elementary school.¹⁶⁴ His teachers in high school and his professors in college were aware of his strange behavior in class: he refused to talk, frightened classmates and faculty with his writings, and refused faculty advice to seek treatment at the counseling center.¹⁶⁵ Even though the Virginia Tech campus had a CARE

¹⁵⁹ NAT’L BEHAVIORAL INTERVENTION TEAM ASS’N, *supra* note 152.

¹⁶⁰ See Mayo Clinic Staff, *Mental Illness: Symptoms*, MAYO CLINIC (May 3, 2014), <http://www.mayoclinic.org/diseases-conditions/mental-illness/basics/symptoms/con-20033813>, archived at perma.cc/V55F-ZPSX, for a list of common symptoms of mental illness.

¹⁶¹ College campuses and workplace environments should, if they have not already, implement confidential or anonymous reporting pathways via the Internet or telephone hotlines. Additionally, forms should be made available for in-person reports.

¹⁶² Richard Brusca & Colin Ram, *A Failure to Communicate: Did Privacy Laws Contribute to the Virginia Tech Tragedy?*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 141, 144 (2010).

¹⁶³ VA. TECH REVIEW PANEL, *supra* note 113, at 52.

¹⁶⁴ *Id.* at 33–34.

¹⁶⁵ *Id.* at 36, 41–43. It is important to note, however, that Cho was evaluated three times

Team,¹⁶⁶ individual members of the team and the team as a whole failed to see the bigger picture. Information was not shared appropriately among academic, administrative, counseling, and public safety departments.¹⁶⁷ Further, the team lacked an expert on threat assessment who could have identified Cho as a substantial risk of danger to himself or others due to all of the red flag behaviors.¹⁶⁸

It is important that everyone in the workplace or educational environment work collectively to piece together little bits of information that, when organized all together, provide a bigger and more accurate picture of the individual of concern or the threat of violence. Too often tragedies have occurred because of a lack of dialogue between people with differing levels of information about a concerning individual; they fail to connect the dots. Increased training and forming a BIT on campus or in the workplace can prevent a potential threat or crisis before it occurs.

C. INCONSISTENT BACKGROUND CHECK POLICIES

Important pieces of legislation pertaining to state and federal background check databases have attempted to make it harder for certain individuals to purchase guns due to their criminal history and mental health records. Under the Brady Handgun Violence Prevention Act, federal law requires gun dealers to perform a background check before selling a firearm.¹⁶⁹ Further, in 2007, Congress passed the NICS Improvement Amendments Act¹⁷⁰ in the wake of the April 2007 shooting at Virginia Tech to strengthen the background check system, improving how mental illness is reported.¹⁷¹ In January 2014, the Obama administration proposed new executive actions on gun background checks that would make it easier for

by Virginia Tech's Cook Counseling Center in 2005 and stayed overnight in the mental health facility after making a suicidal statement in late 2005. *Mental Health Files of Virginia Tech Gunman Released*, CNN (Aug. 19, 2009, 4:43 PM), <http://www.cnn.com/2009/CRIME/08/19/virginia.tech.records/>, archived at <http://perma.cc/D79Q-6PZC>.

¹⁶⁶ VA. TECH REVIEW PANEL, *supra* note 113, at 52. CARE stands for "Communicating Action Response for Emergency" or "Campus Assessment, Response and Evaluation." JED FOUND., *supra* note 151, at 7. A CARE Team serves a similar purpose to a Behavioral Intervention Team. See NAT'L BEHAVIORAL INTERVENTION TEAM ASS'N., *supra* note 152.

¹⁶⁷ VA. TECH REVIEW PANEL, *supra* note 113, at 52.

¹⁶⁸ *Id.*

¹⁶⁹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.) (establishing a National Instant Criminal Background Check System, or NICS).

¹⁷⁰ NICS Improvement Amendments Act of 2007, Pub. L. 110-180, 121 Stat. 2559 (2008) (codified at 18 U.S.C. § 922 (2012)).

¹⁷¹ Karen J. Mathis, *Time for Common Sense: Legal Lessons from Virginia Tech*, MONT. LAW., May 2007, at 28.

states to identify and submit certain mental health information to the federal background check system.¹⁷² Filling these information gaps will better enable the system to keep guns out of the hands of persons prohibited by federal or state law from receiving or possessing firearms.¹⁷³ Unfortunately, many states face state law barriers or lack the technology and resources to update NICS mental health and criminal history records.¹⁷⁴

The ability to perform an effective background check on a prospective purchaser depends on the NICS database having complete, accurate information.¹⁷⁵ Unfortunately, this is the biggest defect in our current system, for a variety of reasons. First, if an individual who plans to perpetrate a mass shooting (Jared Loughner,¹⁷⁶ Adam Lanza,¹⁷⁷ or Seung-Hui Cho,¹⁷⁸ for example) does “not have a known history of mental illness on record¹⁷⁹ or if their medical records were not reported to NICS, then a background check—which is part of [many state gun] licens[ing] application[s]—would never reveal a problem.”¹⁸⁰ Furthermore, states are

¹⁷² One proposal seeks to clarify that HIPAA does not “preclude states from submitting records to the FBI federal background check system for gun purchases.” Sy Mukherjee, *The White House’s New Mental Health Regulations Are a Big Step Toward Gun Violence Prevention*, THINK PROGRESS (Jan. 8, 2014, 4:07 PM), <http://thinkprogress.org/health/2014/01/08/3135021/federal-mental-health-background-checks-gun-violence/>, archived at <http://perma.cc/9Q55-JUPF> (quoting Arkadi Gerney, Senior Fellow at the Center for American Progress). The other proposal would clarify that those who are involuntarily committed to a mental institution—both inpatient and outpatient—count under the law as “committed to a mental institution.” Ashley Parker, *Actions Seek to Further Gun Control*, N.Y. TIMES, Jan. 4, 2014, at A11.

¹⁷³ Perpetrators of gun violence such as Jared Loughner and Seung-Hui Cho were able to purchase a gun due to these gaps in the background check system. Elise Foley, *Virginia Tech Families Call on Congress to Fix Gun Background Checks*, HUFFINGTON POST (Jan. 14, 2011, 6:00 PM), http://www.huffingtonpost.com/2011/01/14/virginia-tech-families-gun-background-checks_n_809395.html, archived at <http://perma.cc/92JF-GTYF>.

¹⁷⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-684, GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS 12 (2012).

¹⁷⁵ See LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 30.

¹⁷⁶ See Lacey & Herszenhorn, *supra* note 1.

¹⁷⁷ See Barron, *supra* note 2.

¹⁷⁸ See Hauser & O’Connor, *supra* note 113.

¹⁷⁹ Seung-Hui Cho was diagnosed with severe social anxiety disorder and received therapy and special education support during his adolescence. VA. TECH REVIEW PANEL, *supra* note 113, at 34, 39. Virginia Tech initiated the process to have Cho committed to a mental hospital; however, the judge only ordered him to obtain outpatient treatment at the university’s counseling center. *Id.* at 56; Jacobs & Jones, *supra* note 11, at 400. Cho did not ever attend the counseling center. *Id.* at 400–01. After this tragedy, Virginia tightened their gun control laws to improve reporting to the NICS. *Id.* at 402.

¹⁸⁰ Alexander C. DePalo, Note, *The Doctor Will See You Now: An Argument for Amending the Licensing Process for Handguns in New York City*, 29 TOURO L. REV. 867,

not required to submit information to NICS under federal law.¹⁸¹ For states that do authorize or require that a report be made to NICS, many only require that a report be made within thirty days (Mississippi,¹⁸² Nebraska,¹⁸³ Texas,¹⁸⁴ and Utah¹⁸⁵) or “one month” (Florida¹⁸⁶). Between the time of the initial report and any restriction on gun purchases actually taking effect, the individual might have ample time to perpetrate a crime, harming him- or herself or others. Lastly, there are other individuals who are not mentally ill and who are not prohibited from purchasing a firearm but may exhibit dangerous behaviors indicating a risk of harm to him- or herself or others.¹⁸⁷ Improving the background check system may prove valuable in the long run if we focus on preventing all dangerous individuals from accessing guns, not targeting only the mentally ill. If the background check system is going to successfully help prevent gun violence, then the remaining states must mandate reporting to the NICS and provide additional funding to strengthen the system.

The current system does not support those suffering from a mental illness and in need of treatment and certainly does not alleviate the stigma associated with mental illness. Blocking access to guns as a method of decreasing violence only skims the surface of the issue; the better solution is to increase the availability of services, raise awareness, and provide funding for treatment of mental illness.

CONCLUSION

State legislatures continue to pass gun control measures to remove guns from the hands of the mentally ill as a method of reducing violence. As a result of these misguided attempts to reduce violence, the focus on

870 (2013). Since Cho was only ordered to seek outpatient treatment and was not involuntarily committed to a hospital, his name was not entered into the state database and he was able to purchase firearms. VA. TECH REVIEW PANEL, *supra* note 113, at 60.

¹⁸¹ See 28 C.F.R. § 25.4 (2013). A federal statute requiring states to disclose records to the FBI would violate the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 933 (1997) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992) (internal quotation marks omitted)). Only forty-three states authorize or require reporting of mental health records to NICS. LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 30.

¹⁸² MISS. CODE ANN. § 9-1-49 (Supp. 2013); *Id.* § 45-9-103.

¹⁸³ NEB. REV. STAT. ANN. § 69-2409.01 (LexisNexis 2009).

¹⁸⁴ TEX. GOV’T CODE ANN. § 411.0521 (West 2012).

¹⁸⁵ UTAH CODE ANN. § 53-10-208.1 (LexisNexis 2010).

¹⁸⁶ FLA. STAT. ANN. § 790.065(2)(a)(4)(c) (West Supp. 2014).

¹⁸⁷ 18 U.S.C. § 922(d) (2012) (stating that it is unlawful to sell a firearm or ammunition to any person convicted of a felony, “an unlawful user of or addict to any controlled substance,” or an individual who “has been adjudicated as a mental defective or has been committed to any mental institution,” among others).

improving our nation's mental health is weakening. Categorical restrictions such as those based on mental illness fail to protect the public and infringe upon individual rights.¹⁸⁸ Instead, resources must be made available to family members and the community in order to enhance an individual's chances of recovery.¹⁸⁹ Linking gun control to issues of mental illness has threatened the ability to seek treatment and has perpetuated the false belief that individuals with a mental illness are violent. We must educate the public and focus on preventative measures that will significantly reduce the possibility of violence. Instead of advocating for stricter gun laws targeted at the mentally ill, we must raise awareness for the need for increased mental health funding and available resources. We are pointing at the wrong target.

¹⁸⁸ Record & Gostin, *supra* note 5, at 9.

¹⁸⁹ Rickhoff & Patterson, *supra* note 31, at 747. Resources include "treatments, medications, hospitals, and the criminal and civil mental health courts," among others. *Id.*