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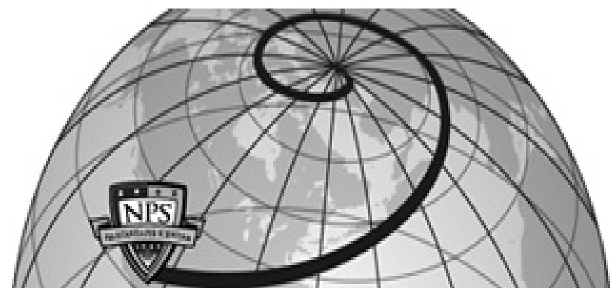

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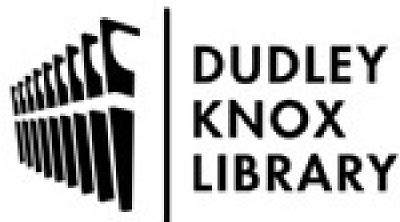

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THESIS

THE ROLE OF MENTAL ILLNESS IDENTIFICATION AND SCREENING IN FIREARM BACKGROUND CHECKS

by

Kevin M. Barklage

December 2017

Thesis Advisor:	Erik Dahl
Second Reader:	Michael Biasotti

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Highly publicized mass shootings, and often the corresponding commentary on the perpetrator's mental health, lead many to question how such a person could have acquired access to a firearm. Mental illness, broadly speaking, is a prohibiting criterion for individuals to purchase a firearm, yet there are several examples of individuals who have a history of mental illness and are able to legally pass a firearm background check. This thesis examines the tenuous relationship between mental illness and violence, and evaluates federal and state laws to assess the prohibited criteria. Individuals with mental illness who go untreated and have co-occurring disorders are at an increased risk of violence, yet may never enter into the courts or are not involuntarily committed to a mental institution. This research concluded, therefore, that statutes need to change by placing less emphasis on involuntary commitment to mental institutions and instead adopt a risk-based approach that restricts firearm access by individuals with a mental illness who may present a risk of violence once they are identified. Legal, procedural, and clinical implications are explored to ensure that individuals' Constitutional rights are protected while mitigating risk and maintaining a primary goal of ensuring effective treatment.

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THE ROLE OF MENTAL ILLNESS IDENTIFICATION AND SCREENING IN FIREARM BACKGROUND CHECKS

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Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF ARTS IN SECURITY STUDIES
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ABSTRACT

Highly publicized mass shootings, and often the corresponding commentary on the perpetrator's mental health, lead many to question how such a person could have acquired access to a firearm. Mental illness, broadly speaking, is a prohibiting criterion for individuals to purchase a firearm, yet there are several examples of individuals who have a history of mental illness and are able to legally pass a firearm background check. This thesis examines the tenuous relationship between mental illness and violence, and evaluates federal and state laws to assess the prohibited criteria. Individuals with mental illness who go untreated and have co-occurring disorders are at an increased risk of violence, yet may never enter into the courts or are not involuntarily committed to a mental institution. This research concluded, therefore, that statutes need to change by placing less emphasis on involuntary commitment to mental institutions and instead adopt a risk-based approach that restricts firearm access by individuals with a mental illness who may present a risk of violence once they are identified. Legal, procedural, and clinical implications are explored to ensure that individuals' Constitutional rights are protected while mitigating risk and maintaining a primary goal of ensuring effective treatment.

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LIST OF ACRONYMS AND ABBREVIATIONS

AOT	Assisted Outpatient Treatment
APA	American Psychiatric Association
DSM	Diagnostic and Statistical Manual of Mental Disorders
FBI	Federal Bureau of Investigation
FFL	Federal Firearm Licensee
HIPAA	Health Insurance Portability and Accountability Act
MHC	Mental Health Court
NIAA	NICS Improvement Amendments Act
NICS	National Instant Criminal Background Check System
SAMHSA	Substance Abuse and Mental Health Services Administration
SMI	Serious Mental Illness *or* Severe Mental Illness

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EXECUTIVE SUMMARY

Americans are emotionally sensitive to the issue of gun violence due to highly publicized mass shootings, which lead to substantial debate over what measures should be taken to keep people safe and prevent such violence. Arguments between gun-rights advocates and gun-control proponents rarely lead to agreement. The influence of mental illness on gun violence, however, superficially seems to invite a consensus. Many call for the seemingly simple task of implementing better mental-health screenings to keep weapons out of the hands of these individuals. Nevertheless, implementing these measures is challenging, in part because the relationship between mental illness and violence is not so simple. Furthermore, identifying individuals with the appropriate mental-illness factors and restricting their access to firearms is a challenging endeavor.

Mental Illness and Violence

According to the National Institute of Mental Health, nearly 20 percent of Americans have some diagnosable form of mental illness. A smaller percentage, approximately 4 percent, have what is known as a serious mental illness (SMI). Mental illness, when framed broadly, does not necessarily indicate an increased risk of violence. The risk increases, however, when the scope of mental illness is narrowed to include specific diagnoses of SMIs and further increases when amplifying factors are considered such as anti-social behavior and substance abuse. Until these individuals act out in violence or enter the criminal justice system, they are likely not identified during a firearm background check.

Legislation

Current federal statutes prohibit access to firearms by individuals who have a mental illness and have been certified as a risk by a court or other authority. Furthermore, the law prohibits access to firearms by individuals who have been involuntarily committed to a mental institution. While these prohibitions must continue, certain individuals with mental illness may be at an increased risk to commit violence prior to their official entry into court system. Even individuals who are receiving treatment may

demonstrate a potential risk for violence and may act out unexpectedly. Legislation, therefore, needs to require timely reporting individuals who may be at risk, even before they demonstrate a history of violence or enter into the criminal justice system, to ensure their identification during a firearm background check before it is too late.

Federal laws need to ensure that the focus of firearm prohibitions is on a totality of the circumstances and does not exclusively focus on the mental health aspects. Furthermore, they should focus on amplifying risk factors such as substance abuse, history of violence, or behavior that would indicate an increased *risk* of violence and not just a *history* of violence. Federal laws also need to place less emphasis on individuals who are involuntarily committed to a mental institution. Given the shifting treatment strategy for individuals with mental illness away from hospitalization due to resource and procedural issues, the laws need to prohibit firearm access by individuals who meet these risk criteria and may be receiving voluntary treatment or are otherwise never committed.

Reporting and Procedural Implications

Clear mental-health criteria that prohibit individuals from purchasing or possessing firearms must be standard across the country. Even with standard criteria, however, prohibitive records must be submitted to a national database to ensure effective background checks. Though there has been some progress with states' reporting, significant variations still exist. Laws should *require*, rather than simply *authorize*, the reporting of limited mental health information that would prohibit an individual from purchasing a firearm based on clear criteria in a comprehensive national database.

Privacy issues associated with reporting mental health records are largely mitigated through specific legislation and regulations that only require enough information to identify that an individual is prohibited. Legal issues, however, arise when restricting rights of individuals who are seeking voluntary treatment and have not entered the criminal justice system, as they are guaranteed Constitutional due process. These individuals should not be burdened with court proceedings if they have not violated any laws, yet they would nevertheless have to be afforded the opportunity to challenge the prohibition. Individuals receiving treatment could acknowledge that their right to

purchase or possess a firearm is temporarily restricted until they have been found to no longer present a threat or risk of violence. Legal issues may arise with having someone with a mental illness, regardless of the severity, effectively waive their Constitutional rights, but it could allow treatment without imposing court procedures. Another option to provide due process is through the increasing presence of Mental Health Courts (MHCs), which could allow clinicians to report certain individuals without waiting for the individual to enter into a criminal court. The expertise of staff at MHCs may ensure the focus is providing proper care while determining whether firearm rights should be restricted and ensuring the individual receives appropriate due process.

Clinical Implications

Many mental-health professionals assert that imposing firearm restrictions will deter individuals with mental illness from seeking help. Others mental-health professionals are concerned that firearm legislation focusing on mental health stigmatize individuals with mental illness. Concerns over a perceived stigma, however, are outranked by cost and ability to access mental-health treatment, among others, as reasons people with mental illness avoid treatment. While some may argue that firearm restrictions are a legal burden, the narrative needs to change so that the restrictions are framed as not as not being punitive in nature, but as part of a treatment plan to ensure their safety. While this thesis focuses on background checks, they alone cannot prevent at-risk individuals with mental illness from accessing guns owned by others, including those owned by family members. Deliberate actions are therefore needed to prevent these individuals from accessing firearms.

Conclusion

Firearm legislation must identify appropriate mental illness diagnoses and other behavioral factors that would designate a person as prohibited from purchasing a firearm. This legislation must also establish clear and standard requirements for reporting appropriate mental health information while accounting for legal due process and judicial involvement. Finally, it must consider the potential ramifications on medical professionals' efforts to effectively treat those with mental illness. Legislators who

implement laws that prevent certain individuals from purchasing or otherwise obtaining a firearm need to have a thorough understanding of these issues. Furthermore, the discourse must be based on research to ensure that productive debate leads to effective actions that will help keep people safe.

Numerous studies and scholarly journal articles assert that most people with mental illness do not commit acts of violence. While this is true, it does not account for certain individuals with severe mental illness, those not receiving treatment, or those with substance abuse or co-occurring disorders. When accounting for these additional factors, individuals with mental illness are indeed at a higher risk for violence. Restricting access to firearms should not be the ultimate goal. Rather, it needs to be an element of a broader strategy to improve access to mental health treatment for these individuals while mitigating risk.

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I. INTRODUCTION

A. PROBLEM STATEMENT

Americans are emotionally sensitive to the issue of gun violence due to perceived vulnerabilities following highly publicized mass shootings, which appear to be an increasing homeland security problem. This politically charged and polarizing issue draws substantial debate over what measures should be taken to keep people safe and prevent such violence. Arguments between gun-rights advocates and gun-control proponents are broad and encompass a wide range of proposed improvements, but rarely lead to agreement. The influence of mental illness on gun violence, however, superficially seems to invite a consensus. After all, nearly half of Americans believe that gun violence can largely be attributed to the failure of the mental-health system in identifying individuals who are prone to such violence and threatening to others.[1]

Intense media coverage following mass shootings and the associated political commentary raise questions about how such people could have accessed firearms. Background checks are required for many firearm purchases, yet individuals with mental illness seem to continue gaining access to guns. Because of the emotional shock from such tragedies, it is understandable to think that only a mentally ill individual would commit such an act. Commentators and politicians call for the seemingly simple task of implementing better mental-health screenings to keep weapons out of the hands of these individuals. Nevertheless, implementing these measures is challenging, in part because the relationship between mental illness and violence is not so simple. Furthermore, identifying individuals with the appropriate mental-illness factors and restricting their access to firearms is a challenging endeavor.

Research is required to examine the current process and propose mental-illness reporting improvements to ensure background checks are effective and address the correct aspects of the problem. First, the process must identify appropriate mental illness

[1] Gallup, "Americans Fault Mental Health System Most for Gun Violence," Gallup Politics Poll, September 20, 2013, http://www.gallup.com/poll/164507/americans-fault-mental-health-system-gun-violence.aspx (accessed March 14, 2017).

diagnoses and other behavioral factors that would designate a person as prohibited from purchasing a firearm. Accurately predicting a person's potential for violence based on a wide range of mental illness conditions is difficult, and mental-health professionals express concerns over "having mental health framed as a response to gun violence because it risks drawing an inherent connection between mental illness and violence."[2] Second, background check legislation must establish clear and standard requirements for reporting appropriate mental illness information. To this end, the act of restricting someone's rights must account for legal due process and judicial involvement. Finally, proposed legislation must consider the potential ramifications on medical professionals' efforts to effectively treat those with mental illness.

This thesis examines the arguments concerning the relationship between mental illness and an individual's propensity to commit violence. This effort facilitates review of current guidelines for reporting mental illness information for use in firearm background checks to determine whether current guidelines are appropriate. The specific processes for reporting mental illness for use in firearm background checks are reviewed to analyze legal aspects that must be considered. The National Instant Criminal Background Check System (NICS) serves as the primary framework for assessing firearm background checks. The divisive discourse on the influence of mental illness on violence, particularly following tragic mass shootings, demonstrates the importance of this research. Legislators who desire to implement guidelines that prevent certain individuals from purchasing or otherwise obtaining a firearm will require thorough understanding of these issues. Furthermore, political discourse must be based on research to ensure that productive debate leads to effective actions that will help keep people safe.

[2] Michael S. Rosenwald, "Most Mass Shooters Aren't Mentally Ill. So Why Push Better Treatment as the Answer?" *Washington Post*, May 18, 2016, https://www.washingtonpost.com/local/most-mass-shooters-arent-mentally-ill-so-why-push-better-treatment-as-the-answer/2016/05/17/70034918-1308-11e6-8967-7ac733c56f12_story.html (accessed September 4, 2016).

B. RESEARCH QUESTIONS

1. Primary Research Question

How can the identification and reporting of mental illness attributes improve the efficacy of background checks and prevent certain prohibited persons from acquiring firearms?

2. Secondary Research Questions

What are the various designations or diagnoses of mental illness and how do they, with other amplifying characteristics, relate to a predisposition to violence?

What criteria should be used to determine which mental illness criteria prohibit a person from access to a firearm?

What current laws, both federal and state, are effective at governing the reporting of mental illness information for firearm background checks?

What legal challenges exist with respect to reporting medical information for potential public-safety purposes?

What legal and judicial processes are required to restrict Constitutional rights due to a concern of violence?

What impacts to treatment result from firearm restrictions on people with mental illness?

C. LITERATURE REVIEW

1. Introduction

Given the increasing public focus on mental illness following mass shootings, a significant amount of this literature examines the relationship between mental illness and violence. The literature on mental illness and its relationship to violence comes principally from medical, public health, and public policy scholars and practitioners. Literature on the firearm background-check process primarily comes from legislation itself and government sources, including official reports and analysis conducted by the Congressional Research Service and other research organizations.

After two laws were passed in the 1930s to regulate firearms in the United States, the Gun Control Act of 1968 was the first major piece of legislation to specifically address mental illness. Drawing an apparent connection between mental illness and a propensity to commit violence, the law prohibits the sale of firearms or ammunition to anyone who "has been adjudicated as a mental defective or has been committed to any mental institution."[3] Adding to the focus on mental health, President Johnson said in connection with signing the law into effect, "we begin to disarm the criminal and the careless and *the insane*"[4] (emphasis added). This language has implications for public perceptions of the relationship between mental illness and gun violence.

Much literature on the topic of mental illness and violence, particularly related to guns, recognizes the influence of media coverage and political commentary on public perception following a mass shooting.[5] Tragic events such as the Sandy Hook Elementary School shooting in Newtown, Connecticut, have caused the public to believe these incidents "fall outside the bounds of sanity."[6] This belief concerns public health experts in that the "popular and political discourse frequently focuses on the causal impact of mental illness."[7] These medical and mental-health professionals posit a more tenuous connection between mental illness and violence. While they generally agree that persons prone to violence should not have access to firearms, Professors Jonathan Metzl and Kenneth MacLeish point out "Notions that mental illness caused any particular shooting, or that advance psychiatric attention might prevent these crimes, are more complicated than they often seem."[8]

This review explores various literature to understand the relationship between mental illness and violence, and draws from mental-health professionals and other

[3] *Gun Control Act of 1968*, HR 17735, Public Law 90–618 (1968).

[4] Lyndon B. Johnson, "Remarks Upon Signing the Gun Control Act of 1968," *Presidential Papers of the Presidents of the United States, 1968–1969*, October 22, 1968.

[5] Emma E. McGinty et al., "News Media Framing of Serious Mental Illness and Gun Violence in the United States, 1997–2012," *American Journal of Public Health* 104, no. 3 (2014): 406–413.

[6] Jonathan M. Metzl and Kenneth T. MacLeish, "Mental Illness, Mass Shootings, and the Politics of American Firearms," *American Journal of Public Health* 105 (2015): 240.

[7] Ibid.

[8] Ibid.

experts. This review then draws upon this relationship to explore literature that assesses mental-illness factors in relation to firearm restrictions. This, too, draws from articles by medical experts but also incorporates analytic and academic literature that assesses legal restrictions based on mental-illness factors. This review demonstrates the need for careful analysis of what mental-illness factors should be considered to prohibit a person's ability to purchase firearms.

2. Mental Illness and Violence

Several studies by medical professionals have explored the relationship between mental illness and violence, with the findings being relatively consistent but difficult to articulate for the purposes of restricting rights to firearms. According to Chloe et al. in a review of nearly 20 years of U.S. empirical studies, "Perpetration of violence and violent victimization are more common among persons with severe mental illness than in the general population."[9] They also found, however, that the research does not "support the stereotype that persons with severe mental illness are typically violent."[10] While mental illness can play a role, there are other factors that may better predict a person's propensity to commit violence.[11]

Two authors who have written extensively on the topic, Paul Appelbaum and Jeffrey Swanson, a psychiatrist and sociologist, respectively, express similar concerns over broadly linking mental illness to violence. They claim that people suffering from certain conditions who are targeted by current laws on firearm restrictions "may not be at higher risk of violence than other subgroups."[12] They caution against the increased attention given to mental illness in firearm restrictions, claiming that the best predictor of violence

[9] Jeanne Y. Chloe et al., "Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns," *Psychiatric Services* 59, no. 2 (2008): 163.

[10] Ibid.

[11] Patrick W. Corrigan and Amy C. Watson, "Findings from the National Comorbidity Survey on the Frequency of Violence Behavior in Individuals with Psychiatric Disorders," *Psychiatric Research* 136 (2005): 153.

[12] Paul S. Appelbaum and Jeffrey W. Swanson, "Gun Laws and Mental Illness: How Sensible are the Current Restrictions?" *Psychiatric Services* 61, no. 7 (2010): 652.

is a "history of violent crime," which already serves as a disqualifier for gun purchases.[13] Their article discusses varying degrees of mental illness, suggesting more focus should be given to specific risk factors rather than a broad designation for anyone who suffers from any form of mental-illness challenges.

Many have examined what impact linking mental illness with violence has on public perception. Patrick Corrigan, an expert on mental illness, argues that such acts increase the stigma associated with individuals suffering from mental illness.[14] This perceived stigma concerns medical professionals over their ability to provide treatment for people with mental illness. Individuals may experience further risk factors if they avoid treatment, which could increase risk factors for susceptibility to violence. Similarly, Appelbaum and Swanson assert that persons who need mental-health treatment may "avoid contact with mental health services out of fear … that it might lead to loss of their right to possess firearms."[15] While some experts are concerned about perpetuating this stigma, psychiatrist E. Fuller Torrey posits that violent acts committed by individuals with mental illness contribute to the association between mental illness and violence.[16]

Individuals who commit mass shooting incidents and suffer from a form of mental illness create challenges for medical professionals who desire to draw a distinction between mental illness and violence. In an article in the *Journal of the American Medical Association for Psychiatry*, Appelbaum recognizes that many perpetrators of such acts suffer from mental illness, but he proposes that, due to "bias in the nonsystematic collection of such data, firm conclusions are impossible at this point."[17] He asserts that many studies focus on the increased risk for violence based on schizophrenia and other

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[13] Paul S. Appelbaum and Jeffrey W. Swanson, "Gun Laws and Mental Illness: How Sensible are the Current Restrictions?" *Psychiatric Services* 61, no. 7 (2010): 654.

[14] Patrick W. Corrigan et al., "Implications of Educating the Public on Mental Illness, Violence, and Stigma," *Psychiatric Services* 55, no. 5 (2004): 577–580, doi: 10.1176/appi.ps.55.5.577.

[15] Paul S. Appelbaum and Jeffrey W. Swanson, "Gun Laws and Mental Illness: How Sensible are the Current Restrictions?" *Psychiatric Services* 61, no. 7 (2010): 654.

[16] E. Fuller Torrey, "Stigma and Violence: Isn't It Time to Connect the Dots?" *Schizophrenia Bulletin, The Journal of Psychoses and Related Disorders* 37, no. 5 (2011): 892–896, https://doi.org/10.1093/schbul/sbr057 (accessed April 6, 2017).

[17] Paul S. Appelbaum, "Public Safety, Mental Disorders, and Guns," *Journal of the American Medical Association Psychiatry* 70, no. 6 (2013): 565.

similar disorders, but cites other research that identifies higher risk from other mental illness factors. Reinforcing the position that most individuals suffering from mental illness are not violent, he posits that any policies that focus solely on mental disorders will fail to appreciably improve public safety. This point underscores the need to carefully consider various risk factors related to mental illness when developing effective background-check measures.

Despite the tenuous relationship between mental illness and violence, researchers are increasingly attempting to identify measures that could help prevent certain individuals from committing acts of violence such as mass public shootings. A recent Naval Postgraduate School (NPS) thesis explored the role of law enforcement in managing persons with mental illnesses.[18] Another NPS thesis explored the impact of persons with mental illness on homeland security.[19] These and other efforts have uncovered a "subgroup of persons with serious mental illness that are significantly more dangerous than persons in the general population."[20] Clearly identifying these people for background checks will be critical for preventing their access to firearms.

3. Mental Illness and Firearm Background-Check Laws

Building on the research of the relationship between mental illness and violence, some literature focuses specifically on the role of mental-illness screening in the firearm background-check process. Identifying causes for concern, two mental-health professionals, Julie Kangas and James Calvert, acknowledge many of the findings from the aforementioned literature–that mental illness alone is not an effective predictor of violence–and assert that "current laws defining 'mental defectives' are not well grounded in research."[21] In another article, psychiatrists Marilyn Price and Donna Norris assert that

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[18] John D. Milby, "Preempting Mass Murder: Improving Law Enforcement Risk Assessments of Persons with Mental Illness," Master's thesis, Naval Postgraduate School, 2015.

[19] Michael C. Biasotti, "Management of the Severely Mentally Ill and its Effects on Homeland Security," Master's thesis, Naval Postgraduate School, 2011.

[20] Richard H. Lamb, Linda E. Weinberger, and Walter J. DeCuir, Jr., "The Police and Mental Health," *Psychiatric Services* 53, no. 10 (2002): 1268, http://psychiatryonline.org/doi/abs/10.1176/appi.ps.53.10.1266 (accessed March 27, 2017).

[21] Julie L. Kangas and James D. Calvert, "Ethical Issues in Mental Health Background Checks for Firearm Ownership," *Professional Psychology: Research and Practice* 45, no. 1 (2014): 80.

identifying individuals who pose an increased risk "can be based more on public perception of risk rather than careful statistical analysis."[22] Therefore, much literature calls for research-based approaches for identifying criteria for determining who should be prohibited from gaining access to firearms.[23]

Some of the literature also considers whether mental-health professionals have a *duty to warn* in the context of providing information that can be used for background checks.[24] Many jurisdictions across the country have relied on a California Supreme Court ruling to require mental-health professionals to notify third parties if there is a danger of violence.[25] However, other jurisdictions have differed on whether such notifications should be mandated, referencing a Texas Supreme Court ruling that found mental-health professionals are not required to make such notifications.[26] These rulings have implications for developing processes for reporting mental-health information to support the firearm background-check process.

Other literature also explores the specific process and various legal issues with reporting medical information, specifically mental-health information, under the Health Insurance Portability and Accountability Act (HIPAA). Edward Liu et al. with the Congressional Research Service address the distinction between receiving treatment for mental illness and being adjudicated as a "mental defective," with the latter requiring a court or some other judicial process.[27] This report also discusses state laws that require the reporting of mental-health information for use in background check determinations. Despite efforts such as the NICS Improvement Amendments Act to encourage states'

[22] Marilyn Price and Donna M. Norris, "National Instant Criminal Background Check Improvement Act: Implications for Persons With Mental Illness," *Journal of the American Academy of Psychiatry and the Law* 36 (2008): 123.

[23] Joseph R. Simpson, "Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals With a History of Treatment for Mental Illness," *Journal of the American Academy of Psychiatry and the Law* 35, no. 3 (2007): 330–338, http://jaapl.org/content/35/3/330 (accessed March 27, 2017).

[24] Julie L. Kangas and James D. Calvert, "Ethical Issues in Mental Health Background Checks for Firearm Ownership," *Professional Psychology: Research and Practice* 45, no. 1 (2014): 80.

[25] Tarasoff v. Regents of University of California, 551 P. 2d 334 (Cal. 1976).

[26] Thapar v. Zezulka, 994 S. W. 2d 635 (Tex. 1999).

[27] Edward C. Liu et al. "Submission of Mental Health Records to NICS and the HIPAA Privacy Rule," Congressional Research Service, April 15, 2013.

mental-illness reporting, there are significant variations in state-level processes and requirements. The Constitutional challenges with mandating federal requirements at the state level present unique challenges to the issue of broad mental illness reporting and firearm background checks.

4. Conclusion

The delicate relationship between mental illness and violence has implications for firearm background check processes. Not all individuals suffering from mental illness are violent and will never act violently toward others. Many who commit violent acts such as mass shootings, however, do exhibit some form of mental illness. Extensive literature evaluates the dichotomy of how having a mental illness does not necessarily cause one to be violent, but in many cases, having a mental illness, along with other factors such as a history of violence or substance abuse, may serve as an indicator of individuals prone to violence. Other literature examines the background check process and explores the nature of mental-health factors that prohibit purchase of firearms. Research for this thesis identifies issues with the current reporting process and examines challenges in identifying individuals with mental illness and restricting their access to firearms.

D. RESEARCH DESIGN

1. Object of Study

This research evaluates processes for reporting mental-health information for use in firearm background checks. An exploration of the relationship between mental illness and violence frames analysis of issues that impact the balance between medical treatment and protection of others. Examination of historical mass-shooting incidents illustrates the role mental illness played in the act and the shooter’s ability to access firearms. Researching current federal laws and various state laws facilitate analysis of issues related to the reporting of mental-health information to the National Instant Criminal Background Check System (NICS). Finally, this thesis considers how legislation that restricts people’s rights may impact their desire to seek treatment.

2. Selection Criteria and Rationale

This research was selected due to differences in how the general public, political leaders, and commentators understand the relationship between mental illness and violence. The complex firearm background check process, including varying requirements among the federal level and different states, necessitates this research. There are multiple aspects of the process, to include the type and scope of mental-health information that is reported to the national database by varying states, which collectively influence the efficacy of the process. Mental illness in relationship to firearm violence is a relevant and timely public safety and homeland security concern.

3. Study Limitations and Scope

The gun control debate encompasses several arguments, including whether more guns leads to increased violence, whether certain firearms should be banned, and whether firearm background checks should be expanded. This research does not explore these arguments but instead strictly examines the process and requirements for mental-health reporting for firearm background checks. Various media highlight the debate over the relationship between mental illness and violence. This research does not assert that all persons with mental illness are more prone to violence, but rather asserts that processes need to be improved to correctly identify people who should have their ability to purchase firearms restricted. Selected mass shooting incidents were chosen due to their highly-publicized nature and media coverage that indicated the perpetrators' history of mental illness.

4. Instrumentation

Sources for the primary research include medical and scholarly literature on the relationship between mental illness and violence, and legislation governing the firearm background check process. This information is augmented by official reports and government studies on the process. Secondary research on the arguments surrounding the nature of mental illness and firearm background-check requirements consults scholarly literature, including studies that have been conducted to examine whether current reporting requirements are effective.

5. Steps of Analysis

This research follows an exploratory policy analysis approach to review the discourse on mental illness and violence in the context of the gun control environment. The initial phase evaluates mental-health criteria for prohibiting access to firearms by evaluating changes proposed in scholarly literature in relation to current guidelines. Historical mass-shooting incidents provide examples that enhance this evaluation. The second phase examines procedural considerations for reporting mental-health information to databases for background checks, and explores legal concerns to determine whether legislatures could and should implement national standards. Finally, this thesis considers the impact these potential changes would have on the ability or desire of individuals with mental illness to seek and receive treatment.

6. Output

The final result of this thesis is research that frames the discussion and offers a perspective on the discourse on the relationship between mental illness and violence. Restricting firearm access for individuals with mental illness will not end all gun violence or suicide. This chapter outlines several challenges with predicting a risk of violence by individuals with mental illness, which further complicates legislating firearm prohibitions for these persons. Nevertheless, this research identifies certain risk factors for people with mental illness and proposes a risk-based approach to expanding firearm restrictions to individuals who exhibit these risk factors and not focus primarily on individuals who are court-ordered for treatment.

Given the difficult task of expanding firearm restrictions to individuals who may present an increased risk of violence, this thesis progressively addresses three main factors for consideration. First, Chapter II examines the relationship between mental illness and violence, and identifies those risk factors that should prohibit persons with mental illness from accessing firearms. Chapter II then examines the legal prohibited criteria at both the federal and state levels and offers two mass-shooting incidents to identify gaps in legislation. Second, Chapter III examines procedural implications of mental-health reporting to facilitate firearm background checks, including legal and

privacy concerns for individuals who have not yet entered the criminal justice system. Third, Chapter IV examines the implications on treatment for restricting firearm access by individuals who are voluntarily seeking treatment or for whom doctors are trying to encourage treatment. This examination also includes other reasons for restricting firearm access by individuals with mental-illness, including suicide, and discusses limitations of background checks, suggesting engagement with family to limit firearm access in the home. Throughout this thesis, the ultimate goal is to simultaneously allow medical professionals to provide effective mental-health treatment and prevent persons with certain risk factors from purchasing or accessing firearms.

II. MENTAL ILLNESS AND VIOLENCE: EXPLORING CURRENT GUN LAWS

A. INTRODUCTION

Mental illness is an oft misunderstood topic that causes challenges when it enters into the discussion over gun control. The issue of mental illness generates much debate over what can be done to identify persons suffering from some form of mental illness and prevent their access to firearms. Incidents of violence committed by persons with reported mental illness contribute to this misunderstanding and invite arguments over the ability to identify such persons to keep others safe. The term *mental illness* is frequently used to assign blame or attempt to explain why certain individuals could commit tragic acts of violence. Commentators following these acts, and the resulting legislative gun-control proposals, call for better processes to identify individuals and prevent their access to firearms. Identifying individuals who present an increased risk based on mental-health factors alone, however, is challenging and requires consideration of several factors.

Mental illness, in a medical context, is a broad term that requires clinical review and specific diagnosis. The clinical goal of evaluating and accurately diagnosing people with mental illness is to ultimately ensure their safety and provide proper care and treatment. There are, however, public-safety interests regarding mental illness diagnoses. If persons pose not only a threat to themselves, but others, steps should be taken to ensure these individuals are not able to purchase or maintain access to a firearm. Procedures exist for clinicians to report patients who make threats, particularly toward or about a known individual. But procedures are lacking at the federal level and at most states to restrict access to firearms for people who are only diagnosed or who never enter the mental health system through courts.

Establishing a direct relationship between mental disorders and a risk for violence is challenging and often debated. Mental-health diagnoses are broad and include eating and hoarding disorders. While these diagnoses may seem to be at one end of a spectrum where there is a low risk of violence, they underscore the point that all forms of mental disorders do not necessarily have a causal relationship with an increased risk of violence.

It is therefore critical to identify what mental illness diagnoses and other mitigating factors would indicate a person's propensity to commit violence and ensure they are unable to purchase or access firearms. This chapter frames the discussion of mental illness, explores the relationship between mental illness and a propensity to commit violence, and examines current laws that utilize mental illness as a disqualifying criterion for purchasing or otherwise obtaining firearms. The final result recommends changes to legislation that could improve identifying prohibited individuals due to mental illness.

B. DISCUSSION OF MENTAL ILLNESS

Most legislative prohibitions on firearms use the terms mental illness, mental disorder, or some similar variation. Framing the discussion of these terms is therefore important. The *Diagnostic and Statistical Manual of Mental Disorders* (DSM) is a guide for diagnosing mental disorders that is developed by the American Psychiatric Association (APA) and used by mental-health clinicians across the United States. The fifth edition of the DSM (DSM-5) was published in 2013, with predecessors dating back to 1844. DSM-5 was developed over a twelve-year period and underwent several levels of review, with the authoring task force soliciting input from hundreds of mental-health experts, social workers, statisticians, neuroscientists, and other specialists. Patients and their families, advocacy groups, and lawyers were also involved in the process.

While the DSM-5 is widely used for evaluating and diagnosing mental disorders, and has been intensely reviewed by a broad range of specialists, it is not without limitations or challenges to its validity. Before DSM-5 was published, for example, the National Institute of Mental Health withdrew its support, citing the manual's "weakness" and "lack of validity."[28] Nevertheless, the APA asserts that DSM-5 serves as a guide that summarizes symptoms of various mental disorders for use by clinicians to diagnose patients and develop an appropriate treatment plan. The APA further states that "Clinical

[28] Christopher Lane, "The NIMH Withdraws Support for DSM-5," *Psychology Today*, May 4, 2013, https://www.psychologytoday.com/blog/side-effects/201305/the-nimh-withdraws-support-dsm-5 (accessed May 18, 2017).

training and experience are needed to use DSM for determining a diagnosis."[29] This guidance is important for non-medical professionals to consider when examining various mental disorders in the context of a person's propensity to commit violence.

Additionally, and particularly applicable to understanding mental health and legislating reporting requirements, the APA provides a clear cautionary statement regarding the use of DSM-5 in a forensic or legal context. The APA emphasizes the importance of DSM-use by appropriately trained medical professionals, stating that there is a risk of misuse or misunderstanding by other individuals due to an "imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."[30] Furthermore, because of variations within categories of diagnosis, "assignment of a particular diagnosis does not imply a specific level of impairment or disability."[31] This thesis, therefore, does not attempt to link specific mental disorders with a risk of violence, but rather uses DSM-5 and mental-health literature to frame various elements of a wide range of mental health issues.

C. RELATIONSHIP BETWEEN MENTAL ILLNESS AND VIOLENCE

An estimated 43.4 million adults, or 17.9 percent of all adults, have some form of mental illness in the United States.[32] The term *mental illness* alone does not address specific issues related to violence. Medical professionals have authored extensive literature that describes mental-illness criteria to consider when identifying a potential increase risk of violence. Most medical professionals are concerned with broadly linking mental illness with violence and assert that most individuals with mental disorders do not act violently towards others. They argue, instead, that medical professionals must look at risk factors for violence rather than mental illness alone. Nevertheless, mental-illness

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[29] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Washington, D.C.: 2013), 5.

[30] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Washington, D.C.: 2013), 25.

[31] Ibid.

[32] National Institute of Mental Health, "Any Mental Illness (AMI) Among U.S. Adults," https://www.nimh.nih.gov/ health/statistics/prevalence/any-mental-illness-ami-among-us-adults.shtml (accessed May 24, 2017).

diagnoses present one aspect of a comprehensive effort to prevent certain individuals from purchasing or obtaining firearms. This chapter does not attempt to determine which individuals, based on a mental-illness diagnosis, demonstrate risk factors for violence–a task best left for medical professionals through direct evaluation. Rather, this chapter frames the discourse on mental illness and violence in the context of legislative efforts to prevent certain individuals from purchasing or possessing firearms.

Some discussion of mental illness amplifies the term with the word *serious* to narrow the scope. In the United States, approximately 9.8 million, or 4 percent of all adults, are estimated to have a serious mental illness.[33] Serious mental illness (SMI) is federally defined as "persons 18 years and older who, at any time during a given year, had a diagnosable mental, behavioral, or emotional disorder that…has resulted in functional impairment which substantially interferes with or limits one or more major life activities."[34] SMI diagnoses typically include "major depression, schizophrenia, and bipolar disorder, and other mental disorders that cause serious impairment."[35] The Substance Abuse and Mental Health Services Administration (SAMHSA) asserts that any mental disorder may cause impairment to some extent and meet the definition of a SMI.[36] SMI diagnoses alone, however, may not indicate an increased risk of violence. Other factors, therefore, must be considered when determining what mental-illness factors should prohibit individuals from purchasing or possessing firearms.

Mental-health experts, as previously mentioned, express concern over broadly linking mental illness with violence. Indeed, authors with extensive mental-health experience have authored numerous articles where they assert that most individuals with

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[33] National Institute of Mental Health, "Serious Mental Illness (SMI) Among U.S. Adults," http://www.nimh.nih.gov/ health/statistics/prevalence/serious-mental-illness-smi-among-us-adults.shtml (accessed May 24, 2017).

[34] Substance Abuse and Mental Health Services Administration, *Results from the 2012 National Survey on Drug Use and Health: Mental Health Findings*, NSDUH Series H-47, HHS Publication No. (SMA) 13–4805. Rockville, MD, 2013: 11.

[35] Substance Abuse and Mental Health Services Administration, "Mental and Substance Abuse Disorders," www.samhsa.gov/disorders (accessed May 23, 2017).

[36] National Registry of Evidence-Based Programs and Practices, "Behind the Term: Serious Mental Illness," Substance Abuse and Mental Health Services Administration, http://www.nrepp.samhsa.gov/Docs/ Literatures/Behind_the_Term_Serious Mental Illness.pdf.

mental illness do not commit acts of violence. A group of experts met at the Johns Hopkins Bloomberg School of Public Health in 2013 and found that “The large majority of people with mental illness do not engage in violence against others, and most violence is caused by factors (e.g., substance abuse) other than mental illness.”[37] This same group, however, also agreed that “At certain times…small subgroups of individuals with serious mental illness are at elevated risk of violence.”[38] This latter finding applied to situations when the individual may be undergoing their first psychosis episode or could be associated with psychiatric hospitalization. One meta-analysis specifically examined this relationship and found, in part, a positive relationship between violence and individuals with psychosis and, to a slightly greater extent, individuals exhibiting externalizing disorders.[39]

Other mental-health professionals analyzed a major study on the relationship between mental illness and violence. They found, in part, that there was “a statistically significant but fairly modest positive association between violence and mental illness.”[40] They also found, however, that there is a low level of risk due to the relatively small number of people who have an SMI and are violent in the population. In short, this analysis underscored the point that “people with serious mental illnesses are, indeed, somewhat more likely to commit violent acts than people who are not mentally ill, but the large majority are not violent toward others.”[41] Nevertheless, legislation that prohibits firearm purchase or possession needs to allow for identifying certain individuals who may pose an increased risk of violence based on mental illness and other factors.

Another meta-analysis found that a significant percentage of homicides committed by persons with psychotic mental illness occurred during the first psychotic

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[37] Emma E. McGinty et al., “Using Research Evidence to Reframe the Policy Debate Around Mental Illness and Guns: Process and Recommendations,” *American Journal of Public Health* 104, no. 11 (2014): e22, doi: 10.2105/AJPH.2014.302171 (accessed May 23, 2017).

[38] Ibid.

[39] Kevin S. Douglas, Laura Gray, and Stephen Hart, “Psychosis as a Risk Factor for Violence to Others: A Meta-Analysis,” *Psychological Bulletin* 135, no. 5 (2009): 679–706.

[40] Jeffrey Swanson et al., “Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy,” *Annals of Epidemiology* 25 (2015): 367.

[41] Ibid., 368.

episode and before treatment.[42] Certain individuals, therefore, may be at an increased risk to commit violence prior to their official entry into the mental-health system or the court system due to some crime or other legal event. Prohibitive criteria for firearms must account for individuals who are at risk for incidents of violence prior to or while receiving treatment. Even if treatment is underway, most prohibitions require a history of violence. Legislation needs to require timely reporting of these individuals, even before they demonstrate a history of violence, to ensure their identification during a firearm background check before it is too late.

D. LEGISLATION

This section examines only the legislative designation of prohibited individuals based on mental-health factors, but does not review the legal arguments or processes for restricting one's rights in this context. Since the passage of the *Gun Control Act* of 1968, federal law defines categories of individuals who are prohibited from receiving firearms or ammunition that has been shipped or transported across state lines. One of these groups includes anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution."[43] Federal law prohibits the sale or transfer of firearms or ammunition to an individual that meets these criteria.[44] Federal law does not, however, define any specific mental illness diagnoses that would disqualify a person from purchasing or obtaining a firearm or ammunition.

> Federal regulations define adjudicated as a mental defective as
>
> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
>
> (1) Is a danger to himself or to others; or
>
> (2) Lacks the mental capacity to contract or manage his own affairs.
>
> (b) The term shall include -
>
> (1) A finding of insanity by a court in a criminal case; and

[42] Olav Nielssen and Matthew Large, "Rates of Homicide During the First Episode of Psychosis and After Treatment: A Systematic Review and Meta-analysis," Schizophrenia Bulletin 36, no. 4 (2010): 702.

[43] 18 U.S.C. § 922(g), (4), Unlawful Acts.

[44] 18 U.S.C. § 922(d), (4), Unlawful Acts.

> (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 of Military Justice, 10 U.S.C. 850a, 876b.[45]

Federal regulations define *committed to a mental institution* as "A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority."[46] This includes involuntary commitment of individuals for reasons such as mental defectiveness, mental illness, or others, including drug use. The term does not, however, apply to individuals who are in a mental institution for observation or for persons who voluntarily admit themselves into a mental institution.[47]

States can prescribe more restrictive prohibited categories of individuals than what are established at the federal level. Laws across the states and the District of Columbia vary, and some rely on restrictions that are established in federal law while others expand the definition of mentally ill. The following paragraphs will examine some of the state laws to frame the variation of prohibited categories and will specifically focus on distinctions from federal law. The review of these laws is not a comprehensive examination of all state firearm laws, but is intended to frame the environment and consider various elements that address mental illness as a disqualifying criterion.

Most states generally rely on federal definitions and prohibitions of individuals who have been "adjudicated as a mental defective" or who have been "committed to a mental institution." These states generally formalize the process for ensuring that persons who are court-ordered for mental-health treatment are reported for background check purposes. Many states, however, have expanded prohibitions through law such as those that define what constitutes mental-health treatment and some that impose minimum time periods that people who receive that treatment are prohibited from purchasing or owning firearms. Few states have enacted laws that prohibit firearm purchase by individuals who voluntarily seek mental-health treatment. Though there are some common themes in

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[45] 27 C.F.R. § 478.11, Meaning of Terms.

[46] 27 C.F.R. § 478.11, Meaning of Terms.

[47] Ibid.

mental-health laws, several variances across states create challenges identifying the appropriate criteria for restricting access to firearms. The following paragraphs highlight state laws with a focus on criteria that differ from federal law.

Some states have expanded laws that prohibit the purchase or possession of firearms by individuals who seek voluntary treatment. California, for example, makes it illegal to possess, purchase, or attempt to purchase a firearm if they are in a facility and are "receiving inpatient treatment and, in the opinion of the attending health professional who is primarily responsible for the patent's treatment of a mental disorder, is a danger to self or others…even though the patient has consented to that treatment."[48] This prohibition is unique among many state laws in that it applies to voluntary treatment, but it ends, however, when the person is discharged from the facility.

California law also establishes firearm prohibitions for a prescribed period of time if they are admitted for mental-health reasons. If a person is detained and admitted to a mental-health facility for evaluation because they are a "danger to himself, herself, or others," they are prohibited from owning a firearm for five years after being released.[49] Similarly, the law prevents a person who makes, to a licensed psychotherapist, a "serious threat of physical violence against a reasonably identifiable victim or victims," from possessing, purchasing, or attempting to purchase a firearm for a period of five years.[50] People meeting these prohibited categories may appeal to a superior court to have their rights restored, provided that the court finds that he or she is "likely to use firearms…in a safe and lawful manner."[51] California law differs from federal law in that it prohibits firearm ownership for persons who voluntarily seek mental-health treatment. The prohibitions for people who are involuntarily admitted and are either certified for intensive treatment or present a risk of violence, however, last for a period of five years. Federal law does not establish any timelines for such prohibitions.

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[48] California Welfare and Institutions Code, *Chapter 3 Firearms*, §8100 (a).

[49] California Welfare and Institutions Code, *Chapter 3 Firearms*, §8103 (f).

[50] California Welfare and Institutions Code, *Chapter 3 Firearms*, §8100 (b).

[51] California Welfare and Institutions Code, *Chapter 3 Firearms*, §8100 (b).

Maryland established a long list of disqualifying criteria for firearms, and is another state that expands on federal law to prohibit firearm possession strictly based on additional mental-health factors. Maryland statutes include federal restrictions due to any involuntary admission to a mental-health facility, but also expand on federal law to also include persons who have "been voluntarily admitted for more than 30 consecutive days" as a criterion that prohibits possession of a "regulated firearm."[52] In Maryland, a "regulated firearm" includes handguns or those on a list of "assault weapons."[53] Notably, however, one disqualifying category of persons is anyone that "Has a mental health disorder and a history of violent behavior."[54] This category is unique from federal and most states' laws because it is independent of any commitment to a mental institution. While this latter prohibition applies specifically to mental-illness diagnoses, it also explicitly requires a *history* of violence rather than a *risk* of violence.

Hawaii also prohibits firearm ownership or possession based on mental-illness diagnosis. Unlike most other states, however, Hawaii law prohibits the possession of a firearm by anyone who has been "diagnosed as having a significant behavioral, emotional, or mental disorders *[sic]* as defined by the most current diagnostic manual of the American Psychiatric Association."[55] This category is unique in that it restricts firearm access based solely on a mental-illness diagnosis.

Mississippi includes, as one of the prohibited criteria, a person who has been determined by a court to have a "mental illness…whether ordered for inpatient treatment, outpatient treatment, day treatment, night treatment, or home health services treatment."[56] This law differs from federal law and laws of many other states in that it does not explicitly address *danger to self or others* or a history of violence. Furthermore, it includes outpatient treatment as one of the prohibited criteria. It does not, however, explicitly prohibit persons who seek voluntary mental-health treatment or those who

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[52] Code of Maryland Regulations, *Weapons Regulations, Possession,* §29.03.01.03 (A) (10).

[53] Maryland Statues, *Public Safety*, §5-101 (r).

[54] Code of Maryland Regulations, *Weapons Regulations, Possession,* §29.03.01.03 (A) (9).

[55] Hawaii Revised Statutes, §134-7 (c) (3), 2013.

[56] Mississippi Code, *Public Safety and Good Order, Federal Firearm Reporting*, §45-9-103 (1) (a).

suffer from mental illness and may present a risk of violence but are never ordered for treatment.

New York prohibits the issuance of a gun license to any individual "who has stated whether he or she has ever suffered from a mental illness" or anyone who has been involuntarily committed to a designated facility for mental health reasons.[57] New York law defines *mental illness* as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment, and rehabilitation."[58] This definition is broad and encompasses a potential wide range of mental disorders.

Following the 2012 school shooting in Newtown, Connecticut, New York passed a law which expanded mental-health reporting for firearm background checks. Under the new statute, mental health professionals shall report individuals who they assess as being "likely to engage in conduct that would result in serious harm to self or others."[59] This requirement highlights the importance of reporting individuals who present a *risk* of violence, rather than a *history* of violence. It does not, however, explicitly define mental-health criteria and relies on observations and professional opinions of medical professionals.

Florida recently adjusted the definition of *committed to a mental institution*, which was previously defined as "involuntary commitment, commitment for mental defectiveness or mental illness, and commitment for substance abuse."[60] A 2013 law, however, modified this definition to account for voluntary treatment under certain circumstances. The new statutes prohibit the purchase of firearms by individuals who are voluntarily admitted to a mental institution, provided that: a physician "found that the person is an imminent danger to himself or herself or others;" if the person did not agree

[57] New York Code, Penal Law, Licenses to carry, possess, repair, and dispose of firearms, §§400.00 (1) (i-j).

[58] New York Code, *Mental Hygiene Law, Definitions*, §1.03 (20).

[59] New York Code, *Mental Hygiene Law, Reports of Substantial Risk or Threat of Harm by Mental Health Professionals*, §79.46 (b).

[60] Florida Statutes, *Sale and Delivery of Firearms*, §790.065 (b) (I).

to voluntary treatment, a petition for involuntary treatment would be filed; and the person was notified, prior to agreeing to treatment, that their right to purchase a firearm would be restricted.[61] This law also relies on reporting by medical professionals and focuses on risk of violence, but does not explicitly define disqualifying mental disorders. Furthermore, it requires determination that an individual poses an *imminent* danger rather than focusing on individuals who *may* present an increased risk of violence.

E. CASE STUDIES

This section will briefly review select recent mass shooting incidents to examine the mental-health factors impacting the perpetrator. These reviews will also evaluate the mental-illness history in the context of existing statutes that prohibit the purchase or possession of firearms. Hindsight reviews of incidents such as these present a clearer picture of the sequence of events and uncover gaps in action and law. Any such review is not intended to place blame on any particular individual related to the case. Furthermore, this is not a comprehensive review of all mass shooting incidents to imply all individuals with mental illness are likely to commit such acts. Rather, this effort is intended to examine the incidents to uncover shortfalls that may be rectified to prevent future similar events.

1. Virginia Tech, 2007

On April 16, 2007, Seung Hui Cho shot 49 students and faculty at Virginia Tech, killing 32, before shooting and killing himself. The tragic event shocked the nation and prompted critical evaluations of what happened. Media reporting following the incident focused on the mental illness from which Cho suffered and raised questions about how he could have acquired firearms. Cho exhibited signs of depression and social isolation throughout his life and began receiving counseling services in 1997 while he was in sixth grade. He was later prescribed anti-depressants in 1999 after "suicidal and homicidal ideations [were] identified" by his teachers.[62]

[61] Florida Statutes, *Sale and Delivery of Firearms*, §790.065 (b) (II).

[62] "Mass Shootings at Virginia Tech," Virginia Tech Review Panel, August, 2007: 21.

Cho was first ordered for counseling by Virginia Tech in the Fall of 2005, but refused. Cho encountered the Cook County Counseling Center in December 2005 and was briefly admitted to Albans Psychiatric Hospital for evaluation, on December 13. The next day, however, he was determined to not present a risk to himself or others by clinicians and was referred for outpatient counseling. Cho had a series of conflicts with professors throughout 2006 and wrote a creative paper for one class about a "young man who hates the students at his school and plans to kill them and himself."[63] Cho purchased his first firearm in February 2007, a .22 caliber handgun, then a 9 mm handgun the next month. Cho waited the 30-day minimum between purchasing the firearms, per Virginia Law, and successfully passed background checks.

There was a clear history of mental illness in this case that was recognized by numerous individuals, including mental-health professionals. The exact prohibitions for gun purchase, however, create ambiguity and underscore the issue with different statutory requirements at the federal and state level. Furthermore, current laws that prohibit gun purchase do not clearly address the situation surrounding Seung Hui Cho. Distinctions in law between voluntary and involuntary and a failure to address in-patient or out-patient treatment contributed to this ambiguity. A review panel following the event also identified issues with the mental-health system, citing the extensive time and effort it takes to involuntarily commit individuals.[64]

Cho could have been disqualified for a gun purchase under federal law when he was found to present a danger to himself by "court, board, commission, or other lawful authority" due to mental illness. Cho was issued a temporary detaining order on December 13, 2007, and admitted to a hospital for evaluation. While this may meet the prohibited criteria for firearm purchase, an independent psychologist and staff psychiatrist determined the following morning that he did not present a risk to himself or others. Accordingly, a judge ordered out-patient treatment. Neither federal law nor Virginia law, at that time, specifically considered outpatient treatment to be a disqualifying criterion.

[63] Ibid., 23.

[64] "Mass Shootings at Virginia Tech," Virginia Tech Review Panel, August, 2007: 2.

2. Aurora, Colorado, 2012

On July 20, 2012, James Holmes entered the Century 16 movie theater in Aurora, Colorado, and began shooting, killing 12 and injuring 70 others. Media reporting following the incident started to focus on Holmes' mental health, citing classmates and other observes who recognized potential warning signs. The media and public raised questions about how he could have purchased a firearm while suffering from mental illness. The resulting investigation following the shooting revealed that Holmes had been seeing three mental-health professionals prior to his actions in that crowded theater.[65]

Holmes was referred for psychiatric therapy by a social worker earlier in 2012. He underwent psychiatric treatment at the student mental-health services center from the University of Colorado, where Holmes was attending, visiting eight times from between March and June of 2012.[66] During these visits, one of the psychiatrists believed he may suffer from a personality disorder such as a "schizoid or schizotypal' disorder."[67] The doctor also recalled Holmes' discussion of homicidal thoughts, but stated that he did not discuss specific plans or reveal that he intended to commit any acts of violence.

Under federal law, Holmes would have been prohibited from purchasing firearms if he had a mental illness and presented a risk to others, as determined by a court. Furthermore, he would have been prohibited if he had been committed to a mental institution for involuntary treatment. Holmes clearly had a mental illness, as acknowledged by his treating psychiatrist. The psychiatrist, however, did not utilize the fact that Holmes had homicidal thoughts as a reason to determine he posed a risk to others and initiate legal procedures for a psychiatric hold.

It may be clear in hindsight that Holmes clearly presented a risk of violence and measures should have been taken to initiate a psychiatric commitment process. The

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[65] CBS News, "James Holmes saw three mental health professionals before shooting," CBS News, September 19, 2012, www.cbsnews.com/news/James-Holmes-saw-three-mental-health-professionals-before-shooting (accessed May 24, 2017).

[66] Maria L. La Ganga, "James Holmes," *Los Angeles Times*, June 16, 2015, www.latimes.com/nation/la-na-james-holmes-fenton-20150516-story.html (accessed May 24, 2017).

[67] Maria L. La Ganga, "James Holmes Disclosed Homicidal Thoughts but not a Plan, Psychiatrist Says," *Los Angeles Times*, June 16, 2015, www.latimes.com/nation/la-na-james-holmes-fenton-20150516-story.html (accessed May 24, 2017).

psychiatrist was open to interpret whether homicidal thoughts constituted a *danger to others*. If Holmes disclosed no specific intent, the doctor may have determined that there was no actual danger. Aside from the fact that Holmes did, in fact, present a danger to others—a fact now clear in hindsight—firearm prohibition laws were not evidently violated. Holmes was never ordered for involuntary treatment and would therefore not have been reported and identified during a firearm background check. This tragic event could have been prevented if the law required reporting based diagnosis of a mental illness, an individual receiving *any* mental-health treatment, and a reasonable likelihood of violence, rather than leaving ambiguous room for determining what actually constitutes a *danger*.

F. ANALYSIS

This chapter discusses the broad range of mental disorders and the legislation that attempts to identify categories of certain prohibited persons based on mental-health criteria. There is a tenuous relationship between mental illness and violence, despite media coverage and commentators remarks on a perpetrator's mental illness following a mass shooting. There is a wide range of mental-illness diagnoses and not all are indicative of a propensity to commit violence. Mental illness, when framed broadly, does not necessarily indicate an increased risk of violence. The risk increases, however, when the scope of mental illness is narrowed to include specific diagnoses of serious mental illnesses and further increases when amplifying factors are considered such as anti-social behavior, substance abuse, and a history of violence. Furthermore, some of these risk factors can be "potentiated by major psychopathology that goes untreated."[68] Individuals with untreated mental illness who exhibit these behaviors should not be allowed to purchase or possess firearms. The question then becomes whether current laws are effective at accomplishing this goal. A secondary question is how individuals who have a certain mental illness and exhibit risk factors for violence can be prevented from accessing firearms, even if they are receiving treatment.

[68] Jeffrey Swanson et al., "Mental Illness and Reduction of Fun Violence and Suicide: Bringing Epidemiologic Research to policy," *Annals of Epidemiology* 25 (2015): 369.

Federal laws that prohibit the purchase or possession firearms are broad and were developed in the 1960s when the United States faced a much different medical system and approach to mental health. Hospitalization for mental illness was more common than today and more individuals now rely more on out-patient treatment. Furthermore, medical professionals are trying to destigmatize mental illness and encourage more individuals to receive treatment on a voluntary basis. Laws that prohibit firearm purchase or ownership based on mental-illness criteria, therefore, need to account for the current approaches to mental health and place less emphasis on involuntary commitment to a facility.

One issue in federal law for consideration is the language and focus on individuals who are "adjudicated as a mental defective" or who have been "committed to a mental institution emphasis." This establishes that individuals must meet either criteria and, at first glance, implies anyone seeking mental-health treatment may be violent. Instead, the law should focus on prohibiting firearm access for persons who are diagnosed with a mental illness and present a potential risk to self or others, particularly if the mental illness diagnosis is accompanied by other risk factors. This would ensure that the focus of firearm prohibitions is on a totality of the circumstances and does not exclusively focus on the mental-health aspects. Furthermore, it focuses on amplifying risk factors such as substance abuse, history of violence, or behavior that would indicate an increased *risk* of violence and not just a *history* of violence.

Another more important issue with the law is the emphasis on involuntary commitment to a mental-health facility. The law does not prohibit persons who seek voluntary mental-health treatment and does not expressly prohibit persons who receive out-patient treatment. The events surrounding Seung Hui Cho exposed time and resource-related constraints of the medical system to involuntarily commit people. This identified a gap in law that does not account for all types of treatment for mental illness. Some individuals who are never court-ordered for mental-health treatment, or are not *committed to a mental institution*, should still be disqualified from purchasing or owning a firearm. Similarly, some people who seek voluntary or outpatient treatment and demonstrate certain other risk factors should be prohibited from access to firearms – especially if only

for a temporary basis. Federal and most state laws do not currently prohibit firearm purchase by individuals who meet these conditions. The events surrounding James Holmes' mental-health treatment underscore this dilemma.

Considering the focus on involuntary treatment, there should be consideration given to whether any commitment to a facility should be a prohibited criterion. If any individual is diagnosed with a mental illness and may present a potential risk of violence due to their mental health and a presence of other risk factors, this should serve as prohibited criteria alone. Taking that argument a step further, given the tenuous relationship between mental illness and violence, some may question whether mental illness should be a criterion at all. Despite the challenges with broadly linking mental illness and violence, however, there is evidence that individuals with certain SMIs, particularly with other mitigating factors, do present an increased risk of violence.[69] The challenge is to identify these people and encourage reporting so they may receive treatment while mitigating potential risk to themselves or others.

Some may assert that prohibited criteria should include specific diagnoses of mental illness. While this may be appropriate for certain SMIs such as schizophrenia and bipolar disorder, linking specific mental illness diagnoses with a propensity for violence introduces new challenges, including narrowing the scope too far and not addressing other individuals who may be at risk. Adjusting the prohibited criteria to address individuals who may present a potential risk to self or others would ensure that statues utilize a risk-based approach and that less emphasis is given to the mental illness alone.

Federal law relies on the assumption that individuals suffering from a serious mental illness will come into contact with law enforcement, receive a psychological evaluation, and be ordered for commitment to a mental institution for treatment. Federal law otherwise depends on mental-health doctors to determine that a person suffering from mental illness presents a danger to him or herself or others. Though accurately predicting if or when an individual presents a danger is a difficult prospect, many states' laws require the individual to present an *imminent* danger or have a history of violent behavior.

[69] Jeffrey Swanson et al., "Mental Illness and Reduction of Fun Violence and Suicide: Bringing Epidemiologic Research to policy," *Annals of Epidemiology* 25 (2015): 350.

They do not explicitly allow for the prohibition of individuals who are appropriately diagnosed with a mental illness and present a *potential* risk to self or others. There have been several cases litigated where mental-health professionals are challenged if they did not report an individual who informed the doctor about violent thoughts and then later committed an act of violence. Furthermore, waiting until an individual who has a mental illness to have a demonstrated history of violence may be too late.

Most state laws that prohibit firearm purchases or possession were based on federal law and therefore suffer from the same challenges. Many states, such as Maryland, California, and New York, have therefore adapted their laws to partially mitigate these limitations. Maryland prohibits individuals from purchasing or possessing firearms if they are diagnosed with a mental disorder and have a history of violent behavior. The Governor of Virginia issued an Executive Order to include court-ordered out-patient treatment as a prohibiting criterion following the Virginia Tech shooting. The variations across states, however, creates gaps that render a national firearm background check process less-than-effective. An individual who is not prohibited under one state law may purchase a firearm in another state where he or she is prohibited since the corresponding records that render him or her prohibited would not have been submitted to the National Instant Criminal Background Check System (NICS).

G. ASSISTED OUTPATIENT TREATMENT

The current disparity in laws at the federal level and across states presents a gap in preventing certain individuals from accessing firearms. Most states have passed specific laws that provide processes for ensuring individuals who meet certain criteria are able to get the treatment they need through court-ordered outpatient treatment. These laws vary across states, however, and are not fully utilized to provide necessary treatment for persons suffering from mental illnesses. Groups such as the Treatment Advocacy Center are pushing for laws which govern this treatment, known as Assisted Outpatient Treatment (AOT), to be utilized more broadly and consistently to enable people to receive treatment prior to their entry into the criminal justice system.

In his master's thesis on the issue of mental illness, retired police chief Michael Biasotti recommended that federal guidelines be established to mandate AOT programs.[70] He asserted that the specific guidelines utilize language that allows affected parties to receive treatment and "are not forced to wait until the dangerous level is reached." Many states currently have AOT laws that require someone be deemed *imminently* dangerous before being eligible for AOT. Some states such as Arizona, however, utilize language that allows clinicians to utilize AOT for individuals based on broader consideration of several factors, including the need for treatment, totality of circumstances surrounding previous behavior, and the ability of the individual to be aware of their need for treatment. Biasotti concluded that

> It is clear that Arizona's assisted outpatient treatment laws take into account important key aspects crucial in understanding the complexities surrounding the severely mentally ill. Arizona's law allows for consideration of the individual's prior acts. It includes persistent or acutely disabled, while accounting for likely occurrences if not treated to include the substantial probability of causing the person to suffer or continue to suffer severe and abnormal mental, emotional or physical harm that significantly impairs judgment, reason, behavior or capacity to recognize reality. Most importantly, I believe that it takes into consideration anosognosia and the persons suffering from a lack of ability to understand the existence of their illness.[71]

These laws could provide a useful framework to augment criteria that prohibit the purchase or possession of firearms based on a priority of ensuring individuals receive proper treatment. At a minimum, any legislation that prohibits firearm access should include individuals who are referred for AOT. The proposed categories that prohibit firearm access, by shifting away from including only those who are committed to a facility, would accomplish the goal and align with AOT options. This approach would additionally utilize a model of intervening before an individual is determined to present an imminent danger and avoid inpatient commitment.

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[70] Michael C. Biasotti, "Management of the Severely Mentally Ill and its Effects on Homeland Security," Master's thesis, Naval Postgraduate School, 2011: 84.

[71] Michael C. Biasotti, "Management of the Severely Mentally Ill and its Effects on Homeland Security," Master's thesis, Naval Postgraduate School, 2011: 61.

H. CONCLUSIONS

Federal law needs to address multiple categories of individuals who are at risk for violence. First, the law must continue to prohibit firearm access by individuals who are diagnosed with an SMI, have mitigating risk factors, and have had repeated hospitalizations for treatment. While current laws, both federal and across states, need to be standardized, they generally address this group of individuals. The other group that should be considered presents more of a challenge. This group includes individuals who are diagnosed with certain mental illnesses and present a potential for violence, particularly those that are seeking treatment voluntarily or are not formally committed to a mental-health facility. Laws on firearm prohibition need to be adapted to allow for an intervention approach that will restrict firearm access for these individuals without relying on an involuntary commitment.

This chapter outlines challenges with implementing firearm prohibitions based on mental-health factors. They will require careful deliberation through improved coordination between mental-health experts, law enforcement, and legal professionals to ensure that any proposals balance: the priority of getting individuals the help and treatment they need; the goal of limiting access to firearms by certain individuals who may present a risk; and ensuring that processes do not restrict Constitutional rights afforded by the Second Amendment without due process.

Restricting the Constitutional rights of individuals who voluntarily seek mental-health treatment is a difficult position to take. Most individuals with mental illness, including those who voluntarily seek treatment, do not present a risk of violence. There is an increased risk of violence, however, with individuals who suffer from an SMI, are involved in the criminal justice system, and involuntarily committed to a mental facility for treatment. Imposing firearms restrictions on these individuals is relatively easy to accept. This represents one end of a spectrum that should invite little disagreement. Firearm restrictions on individuals who are somewhere in the middle of this spectrum, however, including those who have not entered into the criminal justice system but have a diagnosed mental illness and are a potential risk for violence, becomes challenging.

Misunderstandings of mental illness create debates in the context of the gun control that are misguided. The discourse on mental illness needs to change to focus on ensuring individuals receive the help and treatment they need. Priority also needs to be given to a risk-based and evidence-based approach to identify individuals with certain mental illnesses who also present additional risk factors. The delicate balance is ensuring that the correct individuals are prohibited from purchasing or possessing firearms while ensuring that they are not deterred from seeking help due to the firearm prohibition or any legal proceedings. After a tragic mass shooting, it is often easy to see where the sequence of events could have been interrupted. The ultimate goal is to learn from these events and have thoughtful discussions about how the laws need to change to ensure they will not happen again.

This chapter provides a foundation that discusses the relationship between mental illness and violence, particularly in the context of laws that restrict firearm access. The research and examination of incidents demonstrates that these laws need to be changed to shift emphasis away from mental illness alone and toward an approach that identifies individuals who may present a risk of violence based on certain mental illness and other amplifying factors. The following chapter will explore the procedural and legal implications of adopting this approach and will discuss the role of doctors for reporting prohibited criteria to ensure effective background checks.

III. PROCEDURAL IMPLICATIONS: FIREARM BACKGROUND CHECKS AND MENTAL HEALTH REPORTING

A. INTRODUCTION

The previous chapter framed the discussion on mental illness in the context of gun control and presented options for modifying criteria that prohibit certain individuals from purchasing or possessing firearms. One of the key elements of these changes is the need to identify individuals who are at risk but are voluntarily seeking treatment. This chapter will continue to frame the discourse on mental illness but focus more on gun control measures, beginning with an overview of the National Instant Criminal Background Check System (NICS). This will lead to a discussion on challenges with reporting appropriate mental-health records, including variances across states and include some of the privacy and legal factors associated with reporting mental-health information. Finally, this chapter will examine procedural implications for firearm prohibitions for individuals who voluntarily seek treatment.

B. BACKGROUND CHECKS

Identifying accurate mental-health factors that prevent individuals from purchasing or accessing firearms is important. Equally important, however, is development of a robust process that can effectively and efficiently screen individuals to ensure they do not meet any prohibited criteria—particularly those identified mental-health factors. This process is largely accomplished through what are known as background checks. Mandated by the 1993 *Brady Handgun Violence Prevention Act*, the NICS allows licensed sellers across the country to ensure that prospective firearms purchasers do not meet any prohibited criteria established in Section 922 of Title 18, U.S. Code. As codified in this law, anyone other than a licensed individual who is engaged in the business, known as a federal firearms licensee (FFL), is prohibited from selling or shipping a firearm across state lines.[72] Furthermore, the law prohibits anyone from selling or transferring a firearm to anyone who meets one of the prohibited criteria. The

[72] 18 U.S. Code § 922, *Unlawful Acts*

government must therefore ensure that the NICS and other background check processes can effectively identify prohibited individuals.

Many advocates argue that any background check process will not be effective unless all firearm sales are transfers are required to comply with the background check requirement-a measure referred to as *universal background checks*. All gun sales or transfers do not require a background check, which would prevent identification of some individuals who meet prohibited mental-health criteria. This thesis will not address this argument but will rather strictly consider efforts to strengthen the current background check process related to mental-health records. These efforts to ensure background checks are effective involve three distinct objectives.

First, the prohibited mental-health criteria should be standard across the country so that an individual who is not prohibited in one state—and therefore no records are submitted—may not purchase a firearm in another state where he or she would be prohibited. This issue was largely addressed in Chapter II. Second, complete reporting needs to be accomplished to the NICS. All individuals who are prohibited from purchasing firearms, including due to mental-health factors, need to have records submitted to the NICS in a timely manner so that background checks conducted in any state would identify them and prevent the sale. Third, the process for reporting mental-health records to NICS needs to be clear to facilitate the timely and complete reporting of appropriate records. This chapter will outline these three requirements and examine the associated privacy and legal issues. Importantly, this chapter will also address specific legal and treatment implications from restricting firearms rights for individuals who *voluntarily* seek treatment.

C. NICS OVERVIEW

The National Instant Criminal Background Check System (NICS) was initiated in 1998, as mandated by the *Brady Handgun Violence Prevention Act.* Managed by the Federal Bureau of Investigation (FBI), this system provides a centralized national mechanism for checking individuals to ensure do not meet any prohibited criteria prior to them purchasing or possessing a firearm. Between its inception in 1998 and the end of

2016, the NICS processed over 253 million background checks, denying almost 1.4 million, or approximately 0.6 percent. Of those denials, approximately 27 thousand, or 2 percent of all denials and 0.01 percent of all background checks, were due to adjudicated mental-health reasons.[73] These checks were conducted against reports that had been submitted from federal, state, and local law enforcement agencies through their respective reporting processes.

Individuals who are selling or transferring a firearm—primarily FFLs—contact a designated representative to conduct a background check against the NICS Indices. This contact may be in the form of a telephone call or through the FBI's NICS e-check system that was launched in 2002. The designated representative who conducts the NICS check is either a member of the FBI's NICS Section or a state-designated point of contact (POC). As of December 31, 2016, 13 states maintained a "Full POC" relationship, meaning that background checks for all gun sales are conducted against the full NICS Indices by a state representative. Alternatively, 30 states maintained a "Non-POC" relationship where all background checks for gun sales are conducted by the FBI NICS Section. The remaining seven states maintained a "Partial-POC" relationship, where some background checks were conducted by a state representative and other checks were conducted by the NICS Section, typically distinguished by whether it was a handgun or long-gun sale.[74]

D. NICS RECORDS

On December 31, 2006, there were approximately 4.3 million active records in the NICS Indices, of which 298,571, or approximately 7 percent, were related to mental health.[75] Following the shooting at Virginia Tech in April 2007, Congress passed the NICS Improvement Amendments Act (NIAA) to improve reporting of prohibited records, particularly those related to mental-health prohibited criteria, to the NICS by

[73] Criminal Justice Information Services Division, "2016 NICS Operations Report," Federal Bureau of Investigation (2016): 15, 20.

[74] Criminal Justice Information Services Division, "2016 NICS Operations Report," Federal Bureau of Investigation (2016): 3.

[75] Criminal Justice Information Services Division, "2006 NICS Operations Report," Federal Bureau of Investigation (2006): 30.

states and federal agencies. The NIAA utilizes both rewards and penalties, by giving states the ability to waive grant-matching requirements if they improve reporting, or allowing the Attorney General to withhold grants if states do not improve reporting, respectively. As of December 31, 2016, there were approximately 15.8 million records in the NICS Indices.[76] Of those records, approximately 4.6 million, or about 29 percent, were related to mental-health adjudication.[77] Figure 1 shows the total number of records in the NICS Indices since 2005, and Figure 2 shows the number of records related to mental-health adjudication since 2005. These charts have been separated for scale.

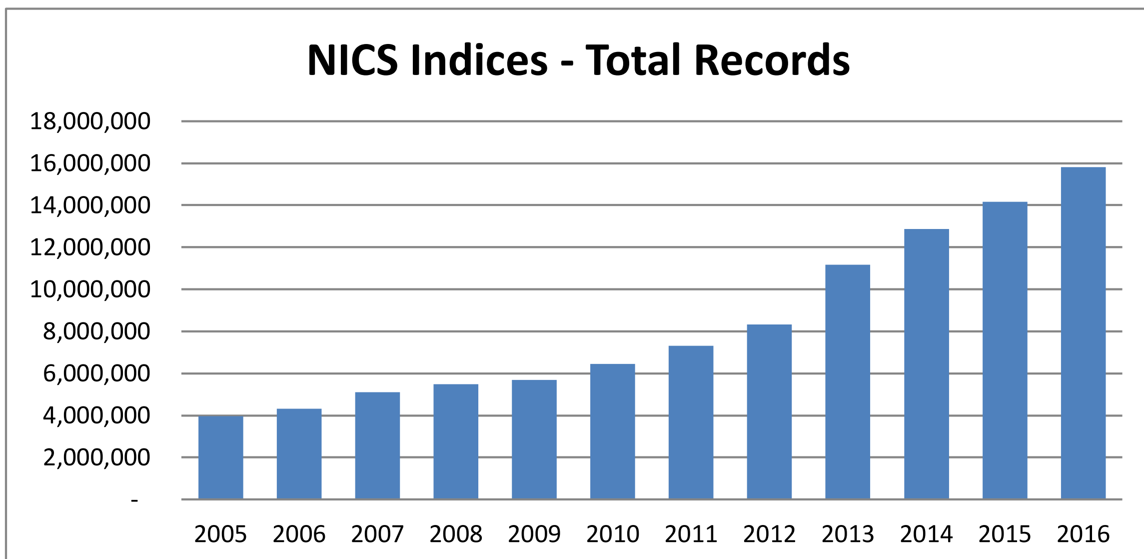

Figure 1. Total number of records in the NICS indices since 2005. Source: Federal Bureau of Investigation, NICS Operational Reports: 2005–2016.

[76] Criminal Justice Information Services Division, "2016 NICS Operations Report," Federal Bureau of Investigation (2016): 27.

[77] Ibid.

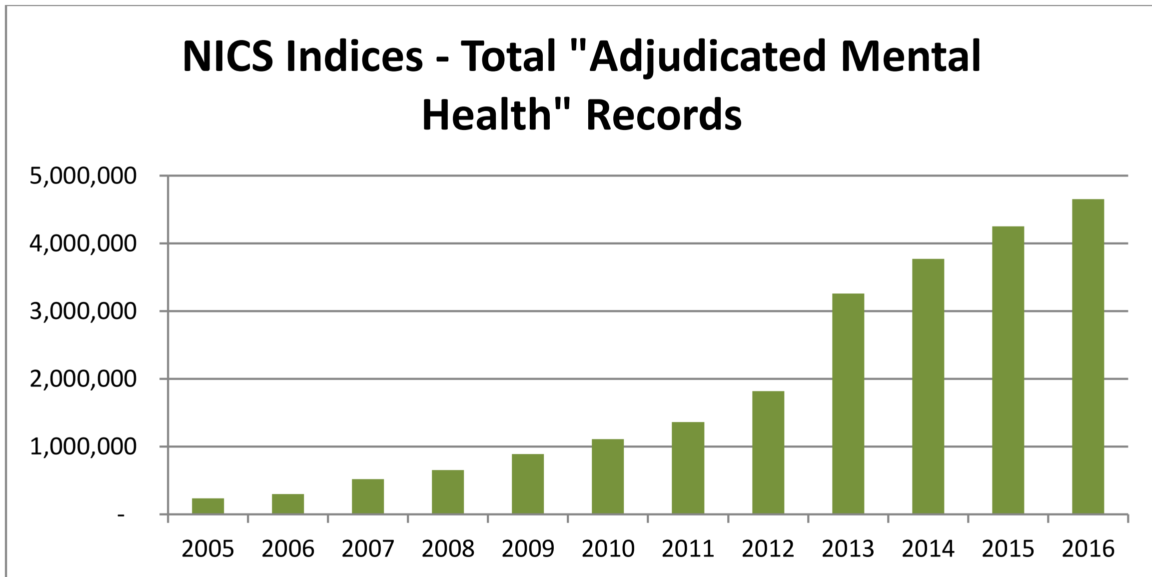

Figure 2. Total number of mental-health records in the NICS indices since 2005. Source: Federal Bureau of Investigation, NICS Operational Reports: 2005–2016.

As the number of mental-health records increased each year, the number of denials associated with mental-health criteria also increased. In 2006, the year before the NIAA went into effect, the percentage of all background checks denials that were due to mental-health adjudication was 0.58 percent. In 2016, this percentage increased to 4.68 percent. This increase occurred despite the fact that the percentage of all background checks that resulted in denial remained relatively flat at less than 1 percent.[78] This indicates that, as the number of mental-health records in NICS increased, the number of denials due to mental health increased. This increase occurred at a rate greater than the rate of total denials. Though it remains a small percentage of total denials, complete reporting to NICS, including mental-health records, is critical to ensuring that background checks are effective at screening individuals who are prohibited based on mental-health factors.

Since the passage of the NIAA, there has been significant improvement in the number of mental health records reported to NICS. Yet there are considerable variations

[78] Criminal Justice Information Services Division, "2016 NICS Operations Report," Federal Bureau of Investigation (2016): 20.

in reporting across states. The proportion of mental-health records to the total number of disqualifying records reported to the NICS varies from state to state, ranging from less than 1 percent to 100 percent.[79] While there are several reasons for this disparity across states, two particular reasons that should be addressed are inconsistent disqualifying mental-health criteria across states and the disparate reporting processes from a variety of sources.

Chapter II addressed the issue of inconsistent disqualifying mental-health criteria. The issue of reporting sources, however, is a secondary effect of the variance in criteria, concerns over privacy, and specific state laws that govern the reporting process. Forty-two states have passed laws that either require or authorize the reporting of mental-health records to the NICS for background checks. Five states have laws that either require or authorize mental-health reporting to an in-state database.[80] The distinction between *authorize* and *require* is important if a goal is to ensure that all appropriate records are submitted. Laws should *require* reporting of mental-health records, but clear criteria still need to be established on which records to report. The federal government cannot mandate that states take action to enforce federal law under the Tenth Amendment to the U.S. Constitution. The 1997 Supreme Court ruling in *Printz v. United States*, which stated that the federal government cannot force states to enforce background checks, has implications to this discussion.

E. PRIVACY ISSUES

One challenge with merging mental health, or medical, information with firearm background checks is a concern over privacy and regulations governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). President Obama, as part of a series of executive actions aimed at mitigating gun violence, ordered a review to remove barriers associated with HIPAA concerns. The Department of Health and Human

[79] Criminal Justice Information Services Division, "Active Records in the NICS Indices as of December 31, 2016," Federal Bureau of Investigation (2017): 4.

[80] Law Center to Prevent Gun Violence, "Summary of State Law," Mental Health Reporting, http://smartgunlaws. org/gun-laws/policy-areas/background-checks/mental-health-reporting/ (accessed July 7, 2017).

Services initiated a rule that became effective in February, 2016, which permits entities covered by HIPAA to submit identities of individuals who are prohibited from purchasing or possessing firearms due to legally-established mental-health criteria.[81] The rule expressly prohibits the release of any clinical or diagnostic information and requires that only enough information is provided to identify that the specific individual is subject to a mental-health criterion that prohibits their access to a firearm.

While legislation and federal rules have largely addressed privacy issues, ongoing discussions between legislators, policy advisors, and mental-health professionals needs to continue to improve communication and alleviate concerns. The implication on treatment plans from mental-health doctors will continue to present a real challenge when discussing reporting any information about their patients. Ultimately, specific medical information should not be reported. Rather, reporting should be limited to only that fact that a specific individual meets one of the prohibited criteria addressed in Chapter II.

F. LEGAL ISSUES

The Second Amendment to the U.S. Constitution states that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Much debate has arisen over the scope and applicability of this right. This thesis does not explore these arguments, but acknowledges the Supreme Court ruling in District of Columbia v. Heller, which stated that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia."[82] This landmark ruling established the foundational right to firearm ownership for all Americans.

In the *Heller* decision, the Supreme Court also acknowledged, however, that the right afforded by the Second Amendment "is not unlimited" and that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of

[81] Department of Health and Human Services, "Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS)," Rule on January 6, 2016, https://www.federalregister.gov/documents/2016/01/06/2015-33181/health-insurance-portability-and-accountability-act-hipaa-privacy-rule-and-the-national-instant (accessed July 7, 2017).

[82] *District of Columbia et al., Petitioners v. Dick Anthony Heller*, 554 U.S. 3 (2008).

firearms by felons *and the mentally ill...*"[83] (emphasis added). This demonstrates that, while individuals have the right to own and possess firearms, this right may be limited or otherwise restricted. The legal issue becomes how this right may be appropriately restricted within the framework of the Constitution.

The Fourteenth Amendment to the U.S. Constitution mandates that rights may not be infringed upon an individual without a legal process. It states, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law."[84] The applicability of this right to the Second Amendment was established in the Supreme Court's ruling in *McDonald v. Chicago*, which overturned lower courts' rulings that the Fourteenth Amendment did not protect Second Amendment rights.[85] This provides the foundational approach for this thesis that firearm access may not be restricted without due process through a legal process.

Processes that restrict an individual's access to firearms require a critical and delicate relationship between a legal process and an individual's mental health. Any restrictions rest on the role of a court or legal process to intervene and find that the individual should be prohibited from purchasing or possessing a firearm. This role is clear in cases where an individual is already involved with the courts through a criminal case, for example. In this situation, prohibiting access to firearms has been established through current law and precedence. This involves individuals who are determined, through a court's rulings and based on medical recommendations, to present a threat and are therefore ordered for treatment. This prohibition becomes less clear, however, for individuals who are being treated without any initial court involvement or commitment to a mental facility.

Though this is not all-inclusive, individuals may generally encounter the mental-health system in one of two ways: through the courts or through mental-health professionals. An individual generally enters initially through the courts after being

[83] *District of Columbia et al., Petitioners v. Dick Anthony Heller*, 554 U.S. 3 (2008).

[84] U.S. Constitution, amend. XIV, sec. 1.

[85] *McDonald, et al. v. City of Chicago, Illinois et al.,* 561 U.S. 742 (2010).

arrested or detained for a mental evaluation. If the individual presents symptoms of mental illness, they will be evaluated. If the individual is diagnosed with a mental illness and presents a risk to self or others, they may be court-ordered for either in-patient or out-patient treatment. In these cases, the individual should have information submitted through the respective state's process to be prohibited from purchasing a firearm. There are certainly situations that require a commitment to a mental-health facility and this chapter is not intended to address those situations. There is precedence and less disagreement about those individuals being prevented from accessing firearms.

If individuals initiate treatment through a mental-health professional, however, there is no clear mechanism for individuals to be reported to NICS unless they are referred to the court for involuntary commitment to a mental-health facility. This may present a gap that does not provide an opportunity to prevent firearm access and mitigate a potential risk without committing someone for treatment. An intermediate option should be considered that would allow an individual to follow a voluntary treatment plan, but would still take measures to ensure they are not able to purchase a firearm. Symptoms of individuals suffering from mental illness can change and may not necessarily be at risk for violence on a particular day. Based on the totality of the circumstances, however, a psychiatric professional may determine that the individual presents a risk of violence. These are the situations that need to be considered.

James Holmes, the perpetrator of the shooting in Aurora, Colorado, was clearly suffering from a mental illness but was never committed to an institution. Analysts who review this case can debate whether the treating psychiatrist should have reported him as a danger to others based on his comments and behavior. The law, however, presents ambiguities because it focuses on involuntary commitment and it requires that the individual present a danger to self or others. Often, as with many state laws, the individual must pose an imminent or immediate danger. The Holmes case clearly demonstrates that individuals who are not engaged in the criminal justice system and are not involuntarily committed to a mental-health facility may still present a risk and should not have access to firearms. Less clearly, however, the Holmes case also demonstrates the challenge of determining what constitutes a *danger*.

The approach for individuals who are seeking voluntary treatment is a critical issue to address. Their rights cannot be restricted without legal due process. A process needs to be developed for the treating mental-health clinician to report the individual to a court to make a ruling. There are significant risks, however, since these individuals should not be burdened with court proceedings if they have not violated any laws. The individual would nevertheless have to be afforded the opportunity to challenge the prohibition. To avoid court, the individual receiving treatment could be provided an opportunity to sign a standard form that effectively waives their court hearing and acknowledges their right to purchase or possess a firearm is temporarily restricted until they have been found to no longer present a threat or risk of violence. There are likely legal issues associated with having someone with a mental illness, regardless of the severity, sign a document that effectively waives their Constitutional rights. It could, however, provide an option to focus on treatment of the individual without imposing court procedures on him or her. Florida law, provided as an example in Chapter II, provides some level of precedence for this type of approach.

Another option to ensure individuals receive due process without going through criminal courts is through the increasing presence of Mental Health Courts (MHCs). Created in 2000 through the America's Law Enforcement and Mental Health Project, MHCs are grant-funded programs that specifically assist individuals with diagnosed mental illness through the legal process "in the least restrictive manner appropriate."[86] MHCs are not without challenges and some feel that they are utilized too late in the process-after a crime has been committed.[87] MHCs do, however, provide an alternative to criminal courts with a focus on ensuring that individuals receive the help and treatment they need. As MHCs continue to mature, they could provide an option for clinicians to report certain individuals who should be prohibited from firearm access without waiting for the individual to enter into a criminal court. The expertise of staff at MHCs may

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[86] *America's Law Enforcement and Mental Health Project*, Public Law 106–515, *U.S. Statutes at Large* 114 (2000): 2201.

[87] Dinah Miller and Annette Hanson, *Committed: The Battle Over Involuntary Psychiatric Care* (Baltimore: Johns Hopkins University Press, 2016), 210.

ensure the focus is providing proper care while determining whether firearm rights should be restricted and ensuring the individual receives appropriate due process.

Assisted Outpatient Treatment (AOT) laws in Arizona, as introduced in Chapter II, present an example of how to move away from verbiage such as *imminent* or *immediate* with respect to a threat of violence. Firearm prohibition laws should similarly adopt language that allows for clinicians to determine, based on a totality of the circumstances, that this individual *may* present a risk of violence and should have access to firearms restricted, even if it is temporarily. This approach would also facilitate intervention early in the process of an individual's mental-health treatment rather than waiting for the individual to become dangerous.

G. CONCLUSIONS

Clear mental-health criteria that prohibit individuals from purchasing or possessing firearms must be standard across the country. Building upon the framework for these criteria from Chapter II, this chapter highlights the various issues associated with mandating these criteria and building a complete database for background checks. Even under the current law, there have been challenges, but some progress, with encouraging states to report the appropriate records. Laws should *require* the reporting of limited mental-health information that would prohibit an individual from purchasing a firearm based on clear criteria. This effort must be continued in order to ensure the NICS Indices provides a comprehensive database to effectively screen individuals prior to a firearm purchase.

Privacy issues associated with reporting mental-health records are largely mitigated through specific legislation and regulations that only require enough information to identify that an individual is prohibited. No medical information, including diagnoses, or other amplifying information on the reason for the prohibition is provided. Legal issues have broadly been addressed for individuals who enter the mental-health process through the courts. In these cases, *due process* is given to individuals, affording them their Constitutional rights while ensuring that risk is mitigated for those that may present a threat of violence.

There are, however, unique legal and procedural issues for individuals who enter mental-health process through a clinician on a voluntary basis. The ultimate goal is to provide these people with the help they need in a timely manner to ensure those that are susceptible to violence do not escalate to that point. Keeping these people out of the criminal justice system will only enhance their treatment. Individuals who may present a potential risk of violence, based on a review of all factors by a psychiatric professional, should be prevented from purchasing or having access to firearms. This should only be viewed as a precautionary measure for those seeking voluntary treatment, and these individuals should not be dragged through burdensome legal processes that may impact their treatment. The following chapter will explore implications of adopting these restrictions on providing treatment.

IV. MENTAL-ILLNESS AND FIREARM RESTRICTIONS: IMPLICATIONS ON TREATMENT

A. INTRODUCTION

This thesis has examined how to identify individuals who demonstrate certain risk factors for violence based on mental illness. Even if they are identified and if they are voluntarily seeking treatment, a key issue is restricting their Second Amendment rights without violating their Fourteenth Amendment rights or, perhaps more importantly, impacting their treatment. Regardless of the specific criteria or justifications for prohibiting access to firearms, some mental-health professionals assert that imposing firearm restrictions will deter individuals with mental illness from seeking help. Concerns over impacting treatment are less for individuals with a serious mental illness (SMI) who have already entered the criminal justice system or are court-ordered for treatment. Concerns over impacting treatment increase, however, when considering gun rights restrictions for individuals while they are considering treatment, or while doctors are trying to encourage treatment.

This chapter explores the potential impact of firearm legislation on individuals with mental illness. This considers underlying issues related to mental illness, concerns over stigmatizing individuals suffering from those illnesses, and measures that could reduce those concerns. This chapter will then examine other considerations for restricting firearm access by at-risk individuals with mental illness such as reducing the potential for suicide and moving beyond background checks alone to mitigate access to firearm owned by others, including in the home. Finally, this chapter will analyze whether doctors have a *duty to warn* about individuals who are at risk and the related impact on the doctor-patient relationship. This analysis will consider the overarching goal of encouraging individuals to seek help and carry out an effective treatment plan while still acknowledging an increased risk and therefore reducing the potential for firearm violence.

B. STIGMA

Comments following mass shooting incidents often focus on the mental-health conditions—either suspected or known—of the perpetrator. Studies have examined how these comments and the resulting exposure to mental illness lead to a public perception that people with mental illness are violent.[88] This thesis acknowledges that mental-health experts frequently point out that most people with mental illness are not violent. Yet some advocates, such as DJ Jaffe who founded Mental Illness Policy Org., have explored the relationship between mental illness and violence, claiming that there are certain associated myths.[89] While most people with mental illness may not be violent, there is an increased risk for individuals who go untreated and studies examined in Chapter II have shown that certain mental illnesses may exhibit a proclivity to violence. These distinctions are important for understanding the relationship between mental illness and violence by the public and legislators considering firearm restriction laws.

Mental-health professionals who examine current or proposed gun laws related to mental health express concern over a negative public perception and a corresponding stigmatization of people with mental illness. In their review of several studies on the subject, Patrick Corrigan et al. concluded that "stereotypes about the dangerousness of persons with mental illness are a key source of prejudice and discrimination against persons with mental illness by the public."[90] In their article on this issue, Paul Appelbaum and Jeffrey Swanson asserted that current gun laws may lead individuals to avoid pursuing mental-health treatment.[91] In their *2016 National Survey on Drug Use and Health*, however, the Substance Abuse and Mental Health Services Administration (SAMHSA) found that most people listed other reasons for not receiving treatment,

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[88] Patrick W. Corrigan et al., "Implications of Educating the Public on Mental Illness, Violence, and Stigma," *Psychiatric Services* 55, no. 5 (2004): 577–580, accessed March 17, 2017, doi: 10.1176/appi.ps.55.5.577.

[89] DJ Jaffe, "Counterproductive beliefs held by mental illness advocates," Mental Illness Policy Org., https://mentalillnesspolicy.org/myths/nami-delusions.html (accessed September 7, 2017).

[90] Patrick W. Corrigan et al., "Implications of Educating the Public on Mental Illness," 577.

[91] Paul S. Appelbaum and Jeffrey W. Swanson, "Gun Laws and Mental Illness: How Sensible are the Current Restrictions?" *Psychiatric Services* 61, no. 7 (2010): 652–654.

ranking concerns over a perceived stigma low on this list.[92] Other reasons for not receiving mental-health services that ranked higher included: inability to afford the cost; lack of knowledge on where to go for services; a belief that the problem could be handled without treatment; and a lack of time.[93]

Treatment of mental health in the United States is a significant problem with many challenges, including cost and access to facilities. In severe cases, individuals with an SMI may not receive treatment because they are not aware they suffer from a mental illness. This condition, referred to as *anosognosia*, results from physical damage to the brain and is therefore different than denial because it is physical rather than psychological.[94] Anosognosia is particularly prevalent with people suffering from certain SMIs such as schizophrenia and bipolar disorder.[95] Regardless of the reason for not seeking or receiving treatment, however, legislation still needs to ensure individuals with certain mental illness cannot purchase or possess firearms.

Restricting access to firearms should not be the ultimate goal. Rather, it needs to be an element of a broader strategy to improve access to mental-health treatment for these individuals while mitigating risk. Their treatment needs must be balanced with the public safety needs as well as ensuring their own safety. Concerns over stigmatization, while somewhat valid, should not inhibit actions to prevent certain individuals' access to firearms. Nevertheless, there are important factors to consider in an effort to avoid deterring individuals from seeking treatment. Shifting the language of current gun laws away from labeling individuals as "mentally defective" would help shift the negative perception of people with mental illnesses.

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[92] Substance Abuse and Mental Health Services Administration, *2016 National Survey on Drug Use and Health,* https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf, Tables 8.53B and 8.54B.

[93] Ibid.

[94] Treatment Advocacy Center, "Serious Mental Illness and Anosognosia," Background Paper, July 2016, http://www.treatmentadvocacycenter.org/key-issues/anosognosia/3628-serious-mental-illness-and-anosognosia (accessed September 19, 2017).

[95] Ibid.

Restricting the ability to purchase or possess firearms is an important goal for persons who have certain SMIs and may present an increased risk of violence. To a large degree, individuals with mental illness do not avoid treatment because they may lose their ability to purchase firearms—they avoid treatment because of other issues with the mental-health system, including difficulty accessing doctors. Even for those who are receiving treatment, Chapter II outlined how current gun laws are not consistent to restrict their access, and Chapter III outlined how reporting of mental-health records is not consistent across both the federal and state levels. This issue needs to be resolved before a sufficient discussion can take place about the intricacies of what may influence people to avoid treatment.

C. REINSTATEMENT OF RIGHTS

One option to mitigate treatment avoidance is the process that allows for reinstatement of gun rights when the individual no longer presents a risk. Under federal law, prohibited individuals may petition the U.S. Attorney General for relief from disabilities associated with gun restrictions. The law requires that the individual demonstrates that he or she "will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[96] In addition to the due process requirement discussed in Chapter III, this provision ensures a process that may restore Constitutional rights under certain conditions. This process, however, introduces additional challenges surrounding the debate over mental illness and gun rights.

Similar to the challenges associated with initially prohibiting firearm access for individuals with mental illness, the vague language in current laws, both at the federal and state levels, creates ambiguity in the process and requirements for reinstating Second Amendment rights. There are several instances where individuals successfully petitioned to reinstate their gun rights, then subsequently committed acts that resulted in criminal

[96] 18 U.S.C. § 925(c), Exceptions: Relief from disabilities.

charges for violent crimes, including those involving the use of firearms.[97] In many of these cases, interpretations of vague firearm prohibition laws, or access to limited information on the mental-health history of the individual, resulted in the reinstatement where it should not have been granted. This illustrates the need for clear requirements on firearm prohibitions that comply with individuals' rights to due process. The legislative discussion outlined in this thesis should inform the reinstatement process as well.

D. OTHER CONSIDERATIONS TO PROVIDE TREATMENT WHILE IMPROVING SAFETY

This thesis predominantly focuses on mitigating the risk of persons with certain mental-health factors purchasing firearms and using them in acts of violence toward others. There are, however, other motivations for preventing access to firearms. In 2014, 33,594 people died as a result of firearm in the United States.[98] Of those, suicide was the cause of 21,386, or approximately 64 percent of all gun-related deaths.[99] Furthermore, firearms were the primary instruments used, representing nearly half of all suicides. It is therefore important to prevent individuals with mental illness who may be at increased risk of violence, including suicide, from accessing firearms.

While some mental-health experts express concern with linking mental illness and violence, there appears to be more willingness to link mental illness with suicide. Swanson et al. acknowledge that, in this context, "mental illness legitimately becomes a strong vector of concern" and assert that "it should become an important component of effective policy to prevent firearm violence."[100] They further point out that "many studies have shown that suicide risk is substantially increased in persons with mental

[97] Michael Luo, "Some With Histories of Mental Illness Petition to Get Their Gun Rights Back," *New York Times*, July 2, 2011, http://www.nytimes.com/2011/07/03/us/03guns.html?mcubz=0 (accessed September 20, 2017).

[98] Centers for Disease Control and Prevention, "Deaths: Final Data for 2014," *National Vital Statistics Report* 65, no. 4 (June 30, 2016): 12.

[99] Ibid.

[100] Jeffrey Swanson et al., "Mental Illness and Reduction of Fun Violence and Suicide: Bringing Epidemiologic Research to policy," *Annals of Epidemiology* 25 (2015): 370.

disorders."[101] While some may argue that individuals who are at risk may commit suicide by other means if firearm access is restricted, a concern associated with firearms is their particular lethality.

Nearly 83 percent of suicide attempts are fatal when the individual utilizes a firearm compared to other less fatal means such as cutting or drug consumption.[102] Furthermore, most individuals who attempt suicide do so impulsively during a time of crisis.[103] It is therefore important to limit access to means that are both conducive to impulsive use and are usually fatal. Measures that restrict access to firearms by individuals with mental illness who may present a risk of violence would mitigate the risk of harm not only to others, but themselves. This measure would align with the ultimate goal of ensuring individuals receive the proper treatment while mitigating the risk of them taking impulsive actions that would interrupt or otherwise impede an effective treatment plan.

E. BEYOND BACKGROUND CHECKS

This thesis predominantly focuses on limiting access to firearms through background checks. There are, however, other and perhaps more important measures that could mitigate the potential for violence or self-inflicted harm by individuals with mental illness. Studies indicate that increased presence of, and access to, guns correlates to an increase in suicides, both by firearm and other means.[104] Background checks alone cannot prevent at-risk individuals with mental illness from accessing guns owned by others, including those owned by family members. Adam Lanza, who killed 20 children and six teachers at Sandy Hook Elementary School in 2012, suffered from mental illness

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[101] Jeffrey Swanson et al., "Mental Illness and Reduction of Fun Violence and Suicide: Bringing Epidemiologic Research to policy," *Annals of Epidemiology* 25 (2015):370.

[102] Rebecca S. Spicer and Ted R. Miller, "Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method," *American Journal of Public Health* 90, no. 12 (2000): 1888.

[103] "Guns and suicide: A fatal link," Harvard School of Public Health, Spring 2008, https://www.hsph.harvard.edu/ news/magazine/guns-and-suicide/ (accessed September 20, 2017).

[104] Justin Thomas Briggs and Alexander Tabarrok, "Firearms and Suicides in U.S. States," *International Review of Law and Economics* 37 (2014): 180–188.

and acquired the weapons he used from home.[105] Deliberate actions are therefore needed to prevent these individuals from accessing firearms.

The tragic shooting in Sandy Hook is just one example of the importance of a broad strategy to provide treatment to individuals suffering from mental illness through coordination with their friends and family. Mental-health professionals recommend that "clinicians should consider screening high-risk individuals for gun access and encourage these individuals to discuss methods for delaying access to guns or preventing access during high-risk periods."[106] This approach is different than legal gun restrictions and relies on open communication between doctors and patients, engagement with families and friends, and placing appropriate priority on treatment and safety. While this does not involve legislative action, it should be part of a comprehensive strategy of empowering clinicians to improve safety of their patients and others without imposing additional legal requirements.

Mental-health providers need to coordinate with the families of patients with mental illness to prevent access to firearms that are in the home or are otherwise accessible by the patient. The primary goal is to continue providing treatment and ensure safety. An additional legislative step, however, may involve consideration of liability for individuals who fail to properly secure firearms that are accessible by individuals who meet prohibited firearm criteria due to mental illness. Many states such as Florida have enacted statutes that make individuals criminally liable for failing to secure firearms that are accessible by minors.[107] While this proposal may invite new legal challenges, it is an element that should receive consideration as part of a broad strategy to prevent firearm access by individuals with mental illness.

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[105] State of Connecticut Office of the Child Advocate, "Shooting at Sandy Hook Elementary School," November 21, 2014, http://www.ct.gov/oca/lib/oca/sandyhook11212014.pdf.

[106] Mark A. Iigen et al., "Mental Illness, Previous Suicidality, and Access to Guns in the United States," *Psychiatric Services* 59, no. 2 (2008): 200.

[107] Florida Statutes, *Safe Storage of Firearms Required*, §790.174.

F. DUTY TO WARN?

Amid the issue of deterring individuals from receiving treatment if they will have their gun rights restricted, individuals with mental illness may avoid treatment if they believe doctors will report them. Furthermore, doctors may be hesitant to report their patients if they feel it would impact treatment efforts. Aside from the HIPAA concerns discussed in Chapter III, this introduces debate over whether doctors have a *duty to warn* when individuals may present a risk of violence. Some argue that reporting individuals to restrict their firearm access will violate the doctor-patient relationship and impede treatment.

The 1976 California Supreme Court ruling in *Tarasoff v. Regents of University of California* has served as a landmark case on the issue of whether a duty to warn exists. In this case, the Court ruled that, if a therapist's "patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."[108] The ruling further states that there are several options the therapist may take, including action to "warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances."[109] This ruling has since influenced state laws on this issue, but has not resolved the debate over what constitutes a duty to warn and to what degree it impacts patient treatment.

Most states have laws that provide specific guidelines, albeit to a great degree of variation, on when mental-health providers must report a threat of violence. Some states explicitly stipulate that mental-health professionals have a duty to warn, while others only imply that a duty exists. Other states only take a permissive approach, stating that mental-health professionals *may* warn. In their exhaustive review of state statutes, Claudia Kachigian and Alan R. Felthous found that "courts have taken diverse approaches in interpreting their state's respective protective disclosure statutes" and that

[108] Tarasoff v. Regents of University of California, 17 Cal.3d 425 (1976).

[109] Ibid.

most courts “left the duty to protect ill defined.”[110] This variation and ambiguity in laws creates challenges for ensuring that mental-health professionals have clear guidance on when they should report individuals who may present a risk of violence.

When considering whether doctors have a duty to warn in the context of firearm restrictions, the concern should be whether the individual with a mental illness presents a potential threat to themselves or others. The Tarasoff decision specifically applied to whether a doctor had a duty to warn to protect a specific individual. Other subsequent court rulings have determined that this duty to warn does not apply to threats to a specific individual.[111] These decisions also address the degree to which the treating doctors had a duty to control actions of the individual receiving treatment. Requirements for doctors to report patients should only extend to limiting their ability to purchase firearms, should ensure actions are taken in the least-restrictive means possible, and should be done with a clear goal of ensuring their continued treatment and safety.

This thesis does not intend to assert that mental-health professionals should be held liable if they fail to report individuals. One concern with doing so is that doctors may over-report or be inclined to commit their patients and thus impose overly-restrictive treatment plans when they otherwise would not have been warranted. Rather, this thesis contends that statutes need to clearly require reporting of individuals who suffer from a mental illness and may present a risk of violence. There are recognized challenges with evaluating who presents a risk absent explicit comments made by the patient. These statues should therefore limit liability only to cases where the doctor’s negligence in identifying this risk prevented their reporting to background checks. The focus needs to remain on treatment while mitigating risk.

G. CLINICAL IMPLICATIONS

Clinicians may express concern over the potential negative impact of their involvement in legal procedures to restrict the rights of their patients. When mental-

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[110] Claudia Kachigian and Alan R. Felthous, “Court Responses to Tarasoff Statutes,” *Journal of the American Academy of Psychiatry and the Law* 32, no. 3 (2004): 272.

[111] Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185 (D. Neb. 1980).

health professionals are providing treatment, they are acting in a role as a therapist. The concern is over impacts to the treatment of these individuals if they simultaneously have to act in a different role of reporting their patients for legal restrictions or otherwise evaluating their patients for risk. Mental-health experts caution that "a therapist's venturing into forensic terrain may be understood as a boundary violation that can compromise therapy."[112] Overlapping these roles risks a perceived expectation that mental-health professionals will facilitate measures that restrict their patients' rights.

There are legitimate concerns over impacting the vital relationship doctors have with their patients, particularly when the primary goal is providing treatment. If an expectation exists for doctors to make a determination of risk and report their patients for firearm restrictions, it may be seen as a punitive measure. The narrative, however, needs to change so that the need to report is framed as not as not being punitive in nature, but as part of the treatment plan to ensure their safety. Under the proposed prohibited legislative criteria, patients would only be reported if they have a mental illness and present a potential risk of violence. They would not be reported if they have *any* mental illness and do not present a risk of violence. This distinction is important in that it presents the need for reporting as an extension of the treatment plan. This reporting process, as discussed in Chapter III however, needs to not be so burdensome that is does create a negative impact on treatment.

H. CONCLUSIONS

Commentators and media coverage following a mass shooting incident frequently focus on the mental health of the perpetrator. This often leads to demands for stricter gun-control measures to keep firearms out of the hands of such individuals. These seemingly simple demands are framed as being common sense. There are, however, several underlying factors that require consideration. Firearm restrictions for individuals with severe mental illness who are already involved in the criminal justice system requires less consideration, though current laws and reporting processes still require adjustment.

[112] Larry H. Strasburger et al., "On Wearing Two Hats: Role Conflict in Serving as Both Psychotherapist and Expert Witness," *American Journal of Psychiatry* 154, no. 4 (1997): 455.

Firearm restrictions for other individuals with mental illness, severe or otherwise, who demonstrate a potential risk for violence introduces unique issues that may influence their desire to seek treatment.

This chapter outlines concerns over stigmatizing persons with mental illness as being inherently violent. Some of these concerns can be mitigated through specific language used in legislation that outlines prohibited criteria. Avoiding the term "mentally defective," for example is one such strategy. Additionally, firearm restrictions need to be part of a broad strategy to focus on treatment. Legislators and mental-health professionals can mitigate stigmatization concerns by shifting the focus of firearm restrictions away from being an action taken because individuals are violent, to an action taken to improve safety of themselves and others while ensuring they can remain on an effective treatment plan.

This chapter also evaluates some statutory actions that may avoid negative impact on treatment. Individuals with mental illness may be encouraged to complete a treatment plan if they understand that firearm restrictions are not permanent and that there is a process to petition for rights reinstatement. The guidelines for this reinstatement, however, require careful consideration to align with the initial prohibited criteria. This is a recognized challenge because mental-health professionals may be hesitant to predict someone no longer presents a risk and should therefore have their rights reinstated. This recognized dilemma should not, however, preclude any initial actions to prevent certain individuals from accessing firearms.

Any action taken could impact the relationship doctors have with their patients. If individuals with mental illness have a fear of being reported, they may avoid treatment. If individuals have a mental illness and have a risk for violence, however, laws still need to require reporting of these individuals with the limited purpose of preventing an ability to purchase a firearm. This process requires clear acknowledgement that the patients are not criminals and that any actions taken do not impose any criminal penalties. Rather, they are a means of acknowledging some level of increased risk and taking some level of action to ensure their safety, but are ultimately part of an overall treatment plan.

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V. CONCLUSIONS

Gun violence is a highly publicized and passionately debated issue in the United States. The restriction of firearms from individuals with mental illness seems to initially invite consensus in this debate. Media coverage following mass shootings frequently focus on the mental illness of the shooter, and therefore supports the public's perception that mental illness is closely associated with violence. Commentators and politicians, therefore, often call for strengthening background check requirements to prohibit such individuals from purchasing guns. This thesis set out to explore the relationship between mental illness and violence, and identify actions that could improve the effectiveness of background checks. As with many complex issues, there are several underlying aspects that require consideration.

Public perception generally associates mental illness with a propensity for violence. Mental-health experts, however, widely express concern with linking the two. Numerous studies and scholarly journal articles cited in this thesis assert that most people with mental illness do not commit acts of violence. While this is true, it does not account for certain individuals with severe mental illness, those not receiving treatment, or those with substance abuse or co-occurring disorders. When accounting for these additional factors, individuals with mental illness are indeed at a higher risk for violence. Additionally, many individuals with mental illness go untreated and many that meet these criteria never enter into the courts are no involuntarily committed to a mental institution. This presents a gap in current legislation that requires action.

A. FIREARM LEGISLATION

Federal law that prohibits individuals from purchasing or possessing firearms require that an individual be either designated as a mental defective or be involuntarily committed to a mental institution. These statutes were written at a time where mental-health treatment heavily focused on commitment to institutions. The laws need to change and adapt to the current approach of mental-health treatment that faces resource challenges with institutional commitment and relies on utilizing outpatient treatment for

patients. While the law should still include individuals who have been commitment to an institution, it only captures one segment of individuals. The law should also include individuals who meet risk factors due to mental illness, even if they are not involuntarily committed to an institution. This should also capture individuals who have not entered into the criminal justice system and therefore have not been identified through legal proceedings. The intent is to ensure these individuals receive treatment and to prevent them from gaining access to firearms that could be used for an act of violence against themselves or others.

Federal law prohibits individuals from accessing firearms if, due to a diagnosed mental illness, they present a danger to themselves or others. State laws interpret this with variation, with many requiring that a person be *imminently* dangerous or have a demonstrated history of violence. These laws need to require clinicians to initiate reporting for firearm restriction if they present a potential risk of violence. The current approach relies on waiting until an individual has demonstrated acts of violence, at which point it may be too late. This process should not be punitive in measure and should not burden individuals who are attempting to receive treatment for their illness. It should, however, be a measured action with the goal of mitigating risk while carrying out the required treatment plan.

B. REPORTING

In addition to the need for specific criteria to prohibit firearm access, procedural improvements are needed to ensure that individuals can be effectively screened. This screening is largely accomplished through federal firearm background checks conducted through the National Instant Criminal Background Check System (NICS). While reporting of disqualifying mental-health criteria has improved, states must continue efforts to expand the role of mental-health screening in background checks. Chapter III identified how an increase in the number of mental-health records led to an increase in denied background checks due to mental-health reasons. This increase occurred at a greater rate than other denials, indicating efficacy of mental-health reporting.

Efforts to encourage reporting through the NICS Improvement Amendments Act (NIAA) must continue. While the federal government does not have the ability to compel reporting, states have the obligation to mandate reporting by establishing clear guidelines in state law. Many current laws *authorize* reporting of mental-health records to the NICS database. Some states only address reporting to an in-state databases. States should *require* reporting to the NICS database to improve efficacy of background checks throughout the country. Otherwise, individuals who are prohibited in one state may be able to purchase a firearm in another state if the background check does not screen against those records or if the records are not in the NICS database.

Though legislative language and reporting processes both need improvement, a positive attribute in current legislation is that it prohibits firearm access by individuals with severe mental illness who are committed to an institution for treatment. Additions to prohibited criteria are needed, however, for individuals who never enter the criminal justice system or are seeking voluntary treatment, provided they meet the criteria for an increased risk of violence. This introduces several challenges with restricting rights while providing due process. This thesis explored mitigation strategies, including a waiver of rights after review of a panel. Florida laws provide a similar process for individuals to acknowledge restriction of their right to purchase a firearm if they agree to voluntary treatment. A key provision of this, however, is they are informed that a petition for involuntary treatment would be filed if they do not agree to the treatment. This should be a model for other states to address firearm restrictions for individuals voluntarily receiving treatment.

As many states shift to outpatient treatment, through court-ordered Assisted Outpatient Treatment (AOT) programs, legislation needs to explicitly prohibit firearm access by these individuals. This ensures individuals receive Fourteenth Amendment rights and aligns with prioritization on the mental-health treatment. Additionally, states need to engage Mental Health Courts in the process to prevent individuals with mental illness from entering into the criminal courts and ensure they receive the required treatment. Firearm restrictions for individuals who meet the prohibited criteria can be managed through these courts without burdening individuals with additional criminal-

court proceedings. The presence of mental-health professionals in these courts will ensure a risk-based approach and prioritization of treatment.

C. IMPACT TO TREATMENT

Current legislation that prohibits firearm access by individuals with mental illness does little to address the potential impact of these restriction on treatment plans. Indeed, individuals who have either already entered into the criminal justice system or are ordered for treatment may have little choice to receive treatment without additional punitive measures. Individuals for whom doctors are trying to encourage treatment, however, should not be imposed with legal burdens associated with firearm restrictions that would deter them from seeking treatment. A focus on treatment and avoidance of verbiage such as "mental defective" would help mitigate any perceived stigma. While this concern over stigma is important, efforts to mitigate risk and improve the safety of individuals with mental illness are still needed. This requires a priority on public safety while balancing the treatment needs for the patients.

Some may argue that individuals with mental illness should not have their gun rights restricted if they are receiving treatment. There is no indication, however, that if an individual presents a risk of violence, their treatment will mitigate this risk or that the treatment would be continued. An individual who already presents a risk may have a momentary lapse and fail to adhere to medication, which increases his or her risk of violence.[113] Furthermore, certain psychiatric medications may actually increase one's tendency to act violently.[114] In either case, individuals in these conditions may obtain access to a gun to commit an act of violence or use it for self-harm.

This thesis focuses on background checks, but there are other means of firearm restrictions through treatment strategies. Mental-health professionals should engage in open communication with patients and their friends and families to prevent individuals with mental illness from gaining access to firearms in the home. This approach ensures

[113] Marvin S. Swartz et al., "Violence and Severe Mental Illness: The Effects of Substance Abuse and Nonadherence to Medication," *American Journal of Psychiatry* 155, no. 2 (1998): 226–231.

[114] Peter R. Breggin, *Medication Madness: The Role of Psychiatric Drugs in Cases of Violence, Suicide, and Crime,* New York: St. Martin's Griffin, 2008.

focus on the treatment while ensuring safety of the patient and others. Mental-health professionals and several studies positively associate mental illness with suicide. Preventing access to firearms by these individuals would mitigate the potential for violence, particularly self-harm.

D. SUMMARY

The purpose of this thesis was to explore the various considerations regarding mental illness and firearm restrictions. The relationship between mental illness and violence is tenuous and requires careful consideration of several factors. There is little debate over restricting rights of individuals with severe mental illnesses who have been involuntary committed to an institution. Yet this thesis outlines the need for laws to change to reflect a shifted approach to mental-health treatment that relies less on such commitment. Firearm restrictions, therefore, need to include certain individuals who are receiving outpatient treatment, particularly on a voluntary basis, and meet risk criteria for violence.

This thesis does not suggest that people suffering from mental illness are violent. Nor does this thesis posit that people who recognize their mental illness and voluntarily seek treatment are likely to be violent. Rather, it suggests that there are certain risk factors involving mental illness that are not sufficiently addressed by current legislation. Legislators need to revise current laws to allow for firearm restrictions on individuals who never enter into the criminal justice system or are not involuntarily committed to a mental institution. The current gun laws were written when individuals with mental illness were more likely to be institutionalized. Under the current approach of prioritizing outpatient treatment and encouraging voluntary treatment, however, the laws need to change to account for these treatment models.

Public and governmental leaders need to understand factors impacting the relationship between mental illness and violence. There are distinct and direct relationships between the two, but not to the same degree often perceived by the public. The current structure for firearm restrictions needs improvement, including amended legislative criteria and guidelines for reporting of individuals who meet these criteria.

This includes adjustments to allow for reporting of individuals who have not entered into the criminal justice system or have not been involuntarily committed. Tragic mass shootings and other acts of violence by individuals who meet these criteria demonstrate this need.

Regardless of the approach or nature of the debate on the issue of gun violence and individuals with mental illness, civic leaders need a comprehensive approach to address the mental-health programs in the United States. This thesis acknowledges that gun restrictions are just one element of this broader issue. Government leaders must engage with mental-health professionals, law enforcement, and other experts when considering any propose legislation. Ultimately, a risk-based approach that incorporates the importance of providing mental-health treatment to individuals will help at least partially address the issue of gun violence.

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