

MENTAL ILLNESS, PROPENSITY FOR VIOLENCE, AND THE GUN CONTROL ACT

By Lindsey Lewis*

I. INTRODUCTION

Are mentally ill individuals violent? Do they know the difference between right and wrong? What might happen if they were given a gun? Do we as a society trust them enough to find out? These are some of the pressing questions surrounding the issue of whether mentally ill people should be allowed to buy and possess guns, or whether it is simply too much of a gamble to entrust these particular individuals with such responsibilities.

Unfortunately, we have already gotten a taste of what could happen under these circumstances. The Virginia Tech tragedy is a recent and very real consequence of guns getting into the hands of the mentally ill.¹ However, this is merely one example.² In light of situations like this, it is crucial that background checks for gun buyers be as complete and accurate as possible, which means supplementing the current National Instant Criminal Background Check System (NICS), run by the Federal Bureau of Investigation.³

* 2011 J.D. candidate, University of Houston Law Center. The author would like to dedicate this article to her parents, for their continuing love and support.

¹ See generally Michael Luo, *Cho's Mental Illness Should Have Blocked Gun Sale*, N.Y. Times, (Apr. 20, 2007), http://www.nytimes.com/2007/04/20/us/20cnd_guns.html?_r=1; Maura Reynolds & Josh Meyer, *Cho Was Under the Gun Sales Radar*, L.A. Times, Apr. 20, 2007, at A21, available at <http://articles.latimes.com/2007/apr/20/nation/na-guns20>

² See *infra* Part V.

³ See generally Fed. Bureau of Investigation, *Overview of National Instant Criminal*

Therefore, in order to keep firearms out of the hands of those who are mentally ill and violent, it is imperative to facilitate communication between state and federal agencies so that more accurate and complete information can be supplied to the NICS. While the federal government has taken steps to do this,⁴ progress is slow,⁵ which leaves those not yet entered into the system still able to purchase firearms.

Participation by the states must be quicker and more active in order to effectuate this goal. This article will begin by discussing the link, if any, between mental illness and violence, as well as current gun control legislation and how it defines mental illness. Next, several real world examples of mentally ill people using guns in a violent and criminal manner will be provided. Finally, some pitfalls of the legislation will be addressed, along with possible ways to improve it.

II. THE LINK BETWEEN MENTAL ILLNESS AND VIOLENCE

The relationship between mental illness and violence is complex and somewhat murky, and studies have generated diverse findings.⁶ Still, a common central theme can be derived from these studies: the majority of violence in the general population is not

Background Check System Checks (2010), available at http://www.fbi.gov/hq/cjisd/nics/nics_overview.pdf [hereinafter FBI, Overview of NICS Checks]. See also Fed. Bureau of Investigation, Response to Inquiries on the FBI's National Instant Criminal Background Check System (April 19, 2007), www.fbi.gov/pressrel/pressrel07/nics041907.htm [hereinafter FBI, 2007 Response to Inquiries].

⁴ See generally NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2007) [hereinafter NICS Improvement Act]. See also Bureau of Justice Statistics, U.S. Dep't of Justice, FY 2010 NICS Act Record Improvement Program (NARIP) for States and State Court Systems Solicitation (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/narip10sol.pdf> [hereinafter BJS, NARIP].

⁵ See The NICS Improvement Amendments Act of 2007, Bureau of Justice Statistics, <http://www.bjp.ojp.usdoj.gov/index.cfm?ty=tp&tid=49> [hereinafter BJS, NICS Improvement Amendments Act] (last visited Oct. 3, 2010) (only three states, Nevada, New York and Oregon, were eligible to receive NICS Improvement Act funds in 2009).

⁶ See Eric B. Elbogen & Sally C. Johnson, The Intricate Link Between Violence and Mental Disorder, 66:2 Archives Gen. Psychiatry 152, 152-53 (2009), available at <http://archpsyc.ama-assn.org/cgi/reprint/66/2/152>.

perpetrated by individuals with mental illnesses.⁷ However, many of these studies use self-reporting as a data collection method, and some subjects may underreport or underestimate the number of incidents of violence in which they have been involved.⁸ Additionally, the amount of time that has elapsed between interviews may affect participants' ability to recall violent events, thus providing another limitation to study results using this method of data collection.⁹ But despite these limitations, at least a small risk of violence remains attributable to those with mental illness, and mental health professionals should acknowledge this risk.¹⁰

Another well-established finding is that people with both mental illnesses and substance abuse problems have a significantly higher risk of being violent.¹¹ While the connection between mental illness and drug or alcohol use is not well-defined, such individuals may be susceptible to drug use¹² because of the impairment of social

⁷ See Paul S. Appelbaum, *Violence and Mental Disorders: Data and Public Policy*, 163:8 *Am. J. Psychiatry* 1319, 1320 (2006), available at <http://ajp.psychiatryonline.org/cgi/reprint/163/8/1319>. See also Richard A. Friedman, *Violence and Mental Illness—How Strong is the Link?*, 355:20 *New Eng. J. Med.* 2064, 2065 (2006), available at <http://content.nejm.org/cgi/reprint/355/20/2064.pdf>; *Am. Psychiatric Ass'n, Access to Firearms by People with Mental Illness 1* (2009), available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/ResourceDocuments/200907.aspx> [hereinafter APA, *Access to Firearms*].

⁸ Elbogen & Johnson, *supra* note 6, at 159.

⁹ *Id.*

¹⁰ "It is natural for psychiatrists and other medical professionals . . . to deny, to some extent, the possible danger. . . [S]till, we need to remind ourselves that the risk of violence, though small, is real, and we must take necessary precautions." Friedman, *supra* note 7, at 2066.

¹¹ See Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in *Violence and Mental Disorder: Developments in Risk Assessment* 101, 113 (John Monahan & Henry J. Steadman eds., 1994). See also Elbogen & Johnson, *supra* note 6, at 155; Friedman, *supra* note 7, at 2065; APA, *Access to Firearms*, *supra* note 7, at 1; Heather Stuart, *Violence and Mental Illness: An Overview*, 2:2 *World Psychiatry* 121, 122 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525086/pdf/wpa020121.pdf>; Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55:5 *Archives Gen. Psychiatry* 393, 399-400 (1998), available at <http://archpsyc.ama-assn.org/cgi/reprint/55/5/393>.

¹² See Elbogen & Johnson, *supra* note 6, at 156 (noting that 46% of patients with severe mental illness had a lifetime history of substance abuse). See also Steadman et al., *supra* note 11, at 400 (noting the patient sample was "significantly more likely to report such symptoms of

relationships, which can lead to a lack of support from others and social isolation, thus exacerbating psychological stress.¹³ As a result, symptoms associated with violence may surface, such as “persecutory delusions, perceived hostility and suspiciousness, anger and dysphoria in general.”¹⁴

Given these considerations, it is important to note that the link between violence and mental illness involves a culmination of many factors.¹⁵ Such factors include a history of violence, substance abuse, marital difficulties, employment status and previous physical abuse from another.¹⁶ Socio-demographic and socio-economic factors are salient as well.¹⁷ Individuals with mental illness may be predisposed to such risk factors,¹⁸ making them more inclined to be violent at some point in their lives.¹⁹ They also are more likely to harm themselves, with suicide being the leading cause of unnatural deaths in those with mental disorders.²⁰

Finally, a discussion of the relationship between mental illness and violence would be incomplete without mentioning the public perspective regarding the issue. The media contributes substantially to public notions that mentally ill individuals are violent.²¹ People are

substance abuse than was the community sample”).

¹³ See Jeffrey W. Swanson et al., *Psychiatric Impairment, Social Contact, and Violent Behavior: Evidence from a Study of Outpatient-Committed Persons with Severe Mental Disorder*, 33 *Soc. Psychiatry & Psychiatric Epidemiology* 586, 593 (1998), available at <http://www.springerlink.com/content/rcajfkt9gk2k2ga3/fulltext.pdf>.

¹⁴ *Id.*

¹⁵ See Friedman, *supra* note 7, at 2066 (noting that “violence in people with serious mental illness probably results from multiple risk factors in several domains”).

¹⁶ Elbogen & Johnson, *supra* note 6, at 158 (listing factors in Table 5).

¹⁷ See Stuart, *supra* note 11, at 123. See also Applebaum, *supra* note 7, at 1321.

¹⁸ Elbogen & Johnson, *supra* note 6, at 156 (“The analyses showed people with severe mental illness were more vulnerable to past histories (eg, physical abuse, parental criminal acts) and prone to experience environmental stressors (eg, unemployment, victimization) that elevate violence risk”).

¹⁹ *Id.* (finding those with severe mental illness “more likely to have a history of violence compared with people without severe mental illness”).

²⁰ See Urara Hiroeh et al., *Death by Homicide, Suicide, and Other Unnatural Causes in People with Mental Illness: A Population-Based Study*, 358 *Lancet* 2110, 2112 (2001).

²¹ Heather L. Stuart & Julio E. Arboleda-Florez, *A Public Health Perspective on Violent*

the most fearful of “violence that is random, senseless, and unpredictable and they associate this with mental illness.”²² However, given that only a small portion of crime is committed by mentally ill persons, public fears are generally disproportionate to the actual risk of harm.²³ Moreover, these societal beliefs further stigmatize those with mental disorders, perhaps making it more difficult for them to seek treatment.²⁴ And treatment has been shown to significantly reduce the risk of violence in the mentally ill.²⁵ But regardless of whether or not treatment is sought, researchers agree that mental illness alone is not the cause of violence.²⁶ Rather, other factors, like those previously mentioned,²⁷ must be taken into account in order to begin to understand the multifaceted connection between

Offenses Among Persons with Mental Illness, 52:5 *Psychiatric Servs.* 654, 654 (2001) (stating that “violent acts that are identified as having been committed by a mentally ill person are those most often sensationalized in the media, further fueling public fear and intolerance”).

²² Stuart, *supra* note 11, at 121.

²³ *Id.* at 123 (saying that “members of the public undoubtedly exaggerate both the strength of the relationship between major mental disorders and violence, as well as their own personal risk from the severely mentally ill”). See also Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89:9 *Am. J. Pub. Health* 1328, 1332 (1999) (noting that “public fears are out of proportion with reality”).

²⁴ See Stuart & Arboleda-Florez, *supra* note 21, at 658. See also Stuart, *supra* note 11, at 122. (“Public perceptions of the link between mental illness and violence are central to stigma and discrimination”); Swanson et al., *supra* note 13, at S92 (stating that such a perception “contributes mightily to the social rejection and stigma that persons with psychiatric disabilities continue to face in the community”); Link et al., *supra* note 23, at 1332-33 (concluding that continued beliefs will negatively affect mentally ill persons “through a reluctance to seek professional help for fear of stigmatization”).

²⁵ See generally Steadman et al., *supra* note 11, at 400 (finding little difference in the risk of violence of treated patients discharged from a hospital and people in the community without mental illness). See also APA, *Access to Firearms*, *supra* note 7 (saying “individuals with mental illnesses engaged in regular treatment are considerably less likely to commit violent acts than those who could benefit from, but are not engaged in, appropriate mental health treatment.”).

²⁶ See Swanson et al., *supra* note 13, at S93 (“[T]his study shows that the impact of psychiatric impairment on violent behavior cannot be known in isolation, but must be considered in a social context.”). See also Stuart, *supra* note 11, at 123 (concluding “mental disorders are neither necessary, nor sufficient causes of violence”); Elbogen & Johnson, *supra* note 6, at 159 (“[I]t is simplistic as well as inaccurate to say the cause of violence among mentally ill individuals is the mental illness itself.”).

²⁷ See Elbogen & Johnson, *supra* note 6 (listing factors); Stuart, *supra* note 11.

mental illness and violence.²⁸

III. THE GUN CONTROL ACT

Under Section 922(g) of the Gun Control Act of 1968, there are nine categories of people prohibited from possessing firearms, including those who have been “adjudicated as a mental defective”²⁹ or have been “committed to a mental institution.”³⁰ “Adjudicated as a mental defective” means that a “court, board, commission, or other lawful authority [has made a determination that a person] . . . is a danger to himself or others; lacks the mental capacity to contract or manage his own affairs; [or is found insane] by a court in a criminal case”³¹ Additionally, “committed to a mental institution” means “a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority.”³² This includes involuntary commitments and commitments for drug use, but does not include voluntary or observational commitments.³³

Although these terms are defined in the Act, the definitions are still somewhat vague, which has prompted courts to more fully determine their scope and meaning.³⁴ Courts are more often faced with the question of what constitutes a “commitment” under 922(g)(4).³⁵ Accordingly, the commitment issue will be discussed more thoroughly, and the adjudication issue will be analyzed briefly towards the end of this section. Both issues are questions of federal

²⁸ Elbogen & Johnson, *supra* note 6, at 159 (“[T]he current study finds that mental illness is clearly relevant to violence risk but that its causal roles are complex, indirect, and embedded in a web of other (and arguably more) important individual and situational cofactors to consider.”).

²⁹ 18 U.S.C. § 922(g)(4)(1968).

³⁰ *Id.*

³¹ 27 C.F.R. § 478.11 (2010).

³² *Id.*

³³ *Id.*

³⁴ See *U.S. v. Giardina*, 861 F.2d 1334, 1335 (5th Cir. 1988); *U.S. v. Chamberlain*, 159 F.3d 656, 658 (1st Cir. 1998); *Gallegos v. Dunning*, 764 N.W.2d 105, 108 (Neb. 2009).

³⁵ See *Giardina*, 861 F.2d at 1335; *Chamberlain*, 159 F.3d at 658; *Gallegos*, 764 N.W.2d at 108.

law, but courts have traditionally sought guidance from state law.³⁶

One of the first cases to address this issue was *U.S. v. Hansel*.³⁷ In that case, a Nebraska mental health board found Hansel to be mentally ill and ordered him to be hospitalized.³⁸ He stayed at the hospital for two weeks, then was released on “convalescent leave,” and shortly thereafter he was discharged.³⁹ The Court said that “an individual may be committed to a hospital if . . . the superintendent of the state mental hospital determines that the individual is mentally ill and then certifies this determination to the County Board of Mental Health.”⁴⁰ Yet even though this was not done, the district court still convicted Hansel of violating the Gun Control Act by buying a firearm after having been committed to a mental institution.⁴¹ The Eighth Circuit reversed the conviction, finding that Hansel had not been committed under the Gun Control Act since the Nebraska law was not procedurally followed.⁴² Instead, the hospital stay was considered observational in nature, which was not enough to establish a commitment under the Gun Control Act.⁴³

Another case, *U.S. v. Giardina*,⁴⁴ was decided several years later, but in much the same way as *Hansel*. Giardina was hospitalized under separate certifications by two doctors.⁴⁵ Under Louisiana law, the two emergency certificates could only detain him for two weeks.⁴⁶ For any detention past fifteen days, a judicial commitment was required.⁴⁷ Giardina only stayed for fourteen days, so no judicial

³⁶ See *Giardina*, 861 F.2d at 1335; *Chamberlain*, 159 F.3d at 658; *Gallegos*, 764 N.W.2d at 108-09.

³⁷ *U.S. v. Hansel*, 474 F.2d 1120 (8th Cir. 1973).

³⁸ *Id.* at 1122.

³⁹ *Id.*

⁴⁰ *Id.* at 1123.

⁴¹ *Id.* at 1121.

⁴² *Hansel*, 474 F.2d at 1123, 1125.

⁴³ *Id.* at 1123.

⁴⁴ *Giardina*, 861 F.2d at 1334.

⁴⁵ *Id.* at 1334.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1336.

commitment ever occurred.⁴⁸ The Fifth Circuit concluded that “[a] review of Louisiana’s admission by emergency certificate procedure reflects its magnitude, but it also clearly reflects that this procedure does not constitute a commitment under Louisiana law.”⁴⁹ Finding no conflict with the federal policy behind the Gun Control Act and that there had been no judicial commitment under Louisiana law, the court vacated Giardina’s conviction and held that his hospitalization did not constitute a commitment under 922(g)(4).⁵⁰

On the other hand, *U.S. v. Waters*⁵¹ had a much different outcome than those of *Hansel* and *Giardina*. Waters was involuntarily hospitalized pursuant to a New York statute that allowed for involuntary hospitalization for sixty days upon the separate certification of two physicians and an application by a relative or other qualified person.⁵² A patient may challenge the involuntary hospitalization by requesting a hearing anytime within the sixty days.⁵³ However, Waters did not challenge the commitment.⁵⁴ Additionally, if it is determined that hospitalization is required beyond the initial sixty days, a formal judicial proceeding is required, unless the patient volunteers to undergo further treatment.⁵⁵ Waters waited until the sixty days had passed and then requested that his involuntary status be changed to voluntary status.⁵⁶ He remained at the hospital on a voluntary basis for seven more months.⁵⁷

Waters argued that his hospitalization did not constitute a commitment under the Gun Control Act “because there was no formal commitment process or judicial order.”⁵⁸ He reasoned that he

⁴⁸ *Id.* at 1334.

⁴⁹ *Giardina*, 861 F.2d at 1336.

⁵⁰ *Id.* at 1336–37.

⁵¹ *U.S. v. Waters*, 23 F.3d 29 (2d Cir. 1994).

⁵² *Id.* at 30.

⁵³ *Id.* at 32.

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 32.

⁵⁶ *Waters*, 23 F.3d at 30.

⁵⁷ *Id.*

⁵⁸ *Id.* at 31.

was never committed by a “court, board or commission”⁵⁹ as it states in the Gun Control Act, but that he was only “admitted” by two physicians.⁶⁰ The Second Circuit disagreed, distinguishing *Hansel* and *Giardina* by noting that in those cases the formal statutory requirements for a commitment were not met, whereas in *Waters*’s case, the initial sixty-day commitment procedures had been correctly followed.⁶¹ Moreover, *Waters* converted his involuntary status to a voluntary one; thus, no formal judicial proceeding was required under the statute.⁶² The court went on to explain that the determination of a commitment in this case was consistent with federal gun control policy by keeping firearms “out of the hands of potentially dangerous and irresponsible persons.”⁶³

In a similar case, *U.S. v. Chamberlain*,⁶⁴ the court carefully considered Congressional intent in determining that Chamberlain had been committed under the Gun Control Act.⁶⁵ Chamberlain was involuntarily hospitalized on an emergency basis for five days.⁶⁶ Much like the statute in *Waters*, hospitalization beyond the initial five days required either that the patient consent on a voluntary basis, or that the chief administrative officer of the hospital obtain an involuntary commitment order from state district court.⁶⁷ After the five days, Chamberlain voluntarily remained at the hospital and no involuntary commitment order was obtained.⁶⁸

Chamberlain argued that this did not amount to a commitment because only an involuntary commitment order obtained from district court, after a formal hearing was held so that the patient

⁵⁹ 27 C.F.R. § 478.11 (2010).

⁶⁰ *Waters*, 23 F.3d at 33.

⁶¹ *Id.* at 34.

⁶² *Id.*

⁶³ *Id.* at 36.

⁶⁴ *Chamberlain*, 159 F.3d at 656.

⁶⁵ *Id.* at 664–65.

⁶⁶ *Id.* at 657.

⁶⁷ *Id.* See *Waters*, 23 F.3d at 30.

⁶⁸ *Chamberlain*, 159 F.3d at 657.

could be heard, constituted a commitment.⁶⁹ The First Circuit disagreed, stating, “we look at the realities of the state procedures and construe them in light of the purposes Congress sought to accomplish by prohibiting firearm possession by someone who has been ‘committed to a mental institution.’”⁷⁰ Chamberlain was examined by multiple doctors, and the procedures for an emergency commitment under the state statute had been correctly followed.⁷¹

Moreover, requiring a formal adversary hearing in court, as Chamberlain suggested, comes too close to the “adjudicated a mental defective” standard under the same provision of the Gun Control Act.⁷² The court said “[r]equiring an adversary hearing and a judicial finding of mental illness would conflate two of the categories Congress singled out for the firearm prohibition.”⁷³ Additionally, the court went on to say that had Congress intended “committed to a mental institution” to require a full adversary hearing, it would have explicitly stated so,⁷⁴ such as when it deemed one of the prohibited categories under 922(g) to be those individuals subject to a court order restraining them from stalking an intimate partner or a child of an intimate partner.⁷⁵ Lastly, the court explained that commitment was appropriate in Chamberlain’s situation because he was of the type that Congress sought to ban from purchasing or possessing guns, and exempting him would simply give him a windfall for having chosen to stay at the hospital on a voluntary basis, even though his mental condition might have been the same as someone who remained at the hospital involuntarily.⁷⁶

One final case to examine is one that is very recent and with a more complex set of facts. Although it is a state case, the same federal

⁶⁹ Id. at 661.

⁷⁰ Id. at 663.

⁷¹ Id.

⁷² Id. at 664; 18 U.S.C. § 922(g)(4)(2006).

⁷³ Chamberlain, 159 F.3d at 664.

⁷⁴ Id.

⁷⁵ Id. at 665 (examining § 922(g)(8)(B)).

⁷⁶ Chamberlain, 159 F.3d at 665.

statute is analyzed and interpreted. In *Gallegos v. Dunning*,⁷⁷ a doctor at a veteran's hospital examined Gallegos and filed a petition with the Mental Health Board of the Fourth Judicial District, saying she believed Gallegos was mentally ill and that she wanted a hearing to determine if he was a dangerous person.⁷⁸ The Mental Health Board appointed a custodial physician for Gallegos, and he was to remain in the care of that custodian for seven days, during which a hearing would be held.⁷⁹ There was a hearing three days after the appointment, in which Gallegos filed a request for a ninety-day continuance so that he could complete inpatient treatment at the hospital.⁸⁰ In his request, he agreed that if he failed to complete the treatment program, the County Attorney could "pursue civil commitment against [him]."⁸¹ Gallegos' request was granted, he completed the treatment and the Mental Health Board petition filed against him was dismissed.⁸²

Several years later, Gallegos was able to obtain a firearms certificate from the Omaha Police Department.⁸³ However, the county sheriff confiscated the certificate and refused to issue him a gun registration, based on his stay at the veterans hospital.⁸⁴ After losing in both county and district court, which affirmed the sheriff's decision⁸⁵, the Supreme Court of Nebraska reversed.⁸⁶ Under Nebraska law, there must be a determination in a hearing that a person is a "mentally ill dangerous person" before a person can be committed.⁸⁷ The court pointed out that this requirement was never

⁷⁷ *Gallegos v. Dunning*, 764 N.W.2d 105 (Neb. 2009).

⁷⁸ *Id.* at 107.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Gallegos*, 764 N.W.2d at 107.

⁸³ *Id.*

⁸⁴ *Id.* at 108.

⁸⁵ *Id.*

⁸⁶ *Id.* at 110.

⁸⁷ *Gallegos*, 764 N.W.2d at 109.

met.⁸⁸ Moreover, the three-day hospitalization before requesting to undergo voluntary treatment was “observational in nature,”⁸⁹ and the Gun Control Act specifically excludes observational hospital admissions.⁹⁰ Therefore, Gallegos was not “committed” under either Nebraska law or 922(g)(4) of the Gun Control Act.⁹¹

These five cases are particularly instructive as to what exactly is and is not a “commitment” under the Gun Control Act. But what about the “adjudicated as a mental defective” language in the same statute? Although there appears to be fewer cases on point, there are a couple of cases that can shed some light on this issue.

In *U.S. v. Vertz*,⁹² the government presented evidence that Vertz had been treated by several doctors for 20 years, diagnosing him with various personality and psychological disorders.⁹³ Additionally, a probate court judge adjudicated him as an individual requiring treatment because he was mentally ill.⁹⁴ However, the court did not order hospitalization, concluding that there were other suitable treatment options.⁹⁵ The district court pointed out that the probate court made no finding that Vertz was “a danger to himself or others”, or that he lacked “the mental capacity to contract or manage his own affairs,”⁹⁶ according to the Federal Firearms Regulations.⁹⁷ Therefore, the court ruled that Vertz had not been adjudicated as a mental defective.⁹⁸⁹⁹

⁸⁸ *Id.* at 110.

⁸⁹ *Id.*

⁹⁰ 27 C.F.R. § 478.11 (2010).

⁹¹ Gallegos, 764 N.W.2d at 110.

⁹² *U.S. v. Vertz*, 102 F. Supp. 2d 787 (W.D. Mich.2000), *aff'd*, 40 F. App'x 69 (6th Cir. 2002).

⁹³ *Id.* at 788.

⁹⁴ *Id.*

⁹⁵ *Id.* at 789.

⁹⁶ 27 C.F.R. § 478.11 (2010).

⁹⁷ *Vertz*, 102 F. Supp. 2d at 788.

⁹⁸ *Id.* Although Vertz was not found to be adjudicated as a mental defective, the court did find that he was “committed” based on the fact that his 1988 hospitalization had been supported by a second psychiatrist’s certification that he was a person requiring treatment. *Id.* at 791.

⁹⁹ *Cf. Hansel*, 474 F.2d. at 1124. (narrowly construing the term “mental defective” to mean a

While the district court in Vertz made a specific finding as to whether or not he had been adjudicated as a mental defective, the court in *New Hampshire v. Buchanan*¹⁰⁰ made no specific findings as to what exactly constituted “adjudicated as a mental defective.” The trial court found Buchanan incompetent to stand trial.¹⁰¹ The Supreme Court of New Hampshire ruled that the trial court erred in ruling as a matter of law that “adjudicated as a mental defective” meant the same thing as incompetent to stand trial.¹⁰² In so deciding, the court said that “competency is not directly related to dangerousness or the ability to contract or manage one’s own affairs,”¹⁰³ which is what is required under federal statute.¹⁰⁴ The court vacated the judgment and remanded the case to the trial court to determine if Buchanan did, in fact, meet the definition of “adjudicated as a mental defective” defined by the statute.¹⁰⁵

These cases have contributed immensely to the scope and meaning of 922(g)(4). However, it is imperative to not only understand how courts define these terms, but also to understand how individuals who fit into this prohibited category are prevented from accessing guns. Congress has directly addressed this problem through the Brady Act, discussed below.

IV. THE BRADY ACT AND THE NICS

After the shooting of President Reagan and his Press Secretary, James Brady, the Brady Handgun Violence Prevention Act was passed in 1993.¹⁰⁶ It established a national waiting period before a

person of subnormal intelligence and feeble mindedness). The Vertz court declined to follow Hansel, noting that it was decided before the enactment of the Federal Firearms Regulations. Vertz, 102 F. Supp. 2d at 788.

¹⁰⁰ See generally *New Hampshire v. Buchanan*, 924 A.2d 422 (N.H. 2007).

¹⁰¹ Id. at 423.

¹⁰² Id. at 424.

¹⁰³ Id.

¹⁰⁴ 27 C.F.R. § 478.11 (2010).

¹⁰⁵ *Buchanan*, 924 A.2d at 424.

¹⁰⁶ Donna M. Norris & Marilyn Price, *Firearms and Mental Illness*, 26:11 *Psychiatric Times* 1, 1 (2009), available at

handgun could be purchased and the National Instant Criminal Background Check System (NICS),¹⁰⁷ which is administered by the FBI.¹⁰⁸ A background check under the NICS includes a check of three databases run by the FBI: the Interstate Identification Index, the National Crime Information Center and the NICS Index.¹⁰⁹ The NICS Index is the database containing information voluntarily submitted by state and federal agencies regarding people who are not allowed to possess firearms based on non-criminal reasons, such as those with disqualifying mental health histories under 922(g)(4).¹¹⁰ Under the act, Federal Firearms Licensees (FFLs) must contact the NICS before transferring a gun to a buyer.¹¹¹ The NICS responds to an inquiry by giving notice to the FFL that the transfer can proceed, is denied, or is delayed.¹¹² In the case of a delay, the FBI has three business days under the Act to obtain any missing or incomplete records.¹¹³ If the missing or incomplete information cannot be found after three days, the FFL has the discretion to sell the firearm to the buyer.¹¹⁴

At the end of 2005, the NICS had over 234,000 records for people with disqualifying mental health histories.¹¹⁵ Yet in January 2006, there was an estimated 2.7 million people who had been involuntarily committed for mental health disorders.¹¹⁶ And as of April 2007, only 22 states contributed any mental health records to

<http://www.donnanorrismd.com/docs/Firearms%20and%20Mental%20Illness.pdf>; FBI, Overview of NICS Checks, *supra* note 3.

¹⁰⁷ 18 U.S.C. § 92 (2006). See generally 28 C.F.R. § 25 (2009).

¹⁰⁸ FBI, Overview of NICS Checks, *supra* note 3.

¹⁰⁹ *Id.*

¹¹⁰ Joseph R. Simpson, *Bad Risk?—An Overview of Laws Prohibiting Possession of Firearms by Individuals with a History of Treatment for Mental Illness*, 35 *J. Am. Acad. Psychiatry L.* 330, 331 (2007), available at <http://www.jaapl.org/cgi/reprint/35/3/330>.

¹¹¹ FBI, Overview of NICS Checks, *supra* note 3.

¹¹² *Id.*

¹¹³ *Id.*; Jim Kessler, *Missing Records: Holes in Background Check System Allow Illegal Buyers to Get Guns*, *The Third Way Culture Project*, at 4 (2007).

¹¹⁴ FBI, Overview of NICS Checks, *supra* note 3. See also Kessler, *supra* note 113, at 4.

¹¹⁵ Federal Bureau of Investigation, *2005 NICS Operations Report*, at 27, 30 (2006), available at http://www.fbi.gov/hq/cjisd/nics/ops_report2005/ops_report2005.pdf.

¹¹⁶ Norris & Price, *supra* note 106, at 1.

the NICS.¹¹⁷ This shortage of records results from states only having to supply mental health records on a voluntary basis.¹¹⁸ This means prohibited individuals are still able to buy guns without being caught by the NICS.¹¹⁹ However, some states have passed their own laws that mimic or are similar to the provisions of 922(g)(4) of the Gun Control Act or the Brady Act.¹²⁰

Taking the Brady Act into consideration, the pertinent question to ask is: *Do background checks actually work?* Unfortunately, they do not always work, as the next section illustrates.

V. THE VIRGINIA TECH SHOOTING AND OTHER REAL WORLD EXAMPLES

In 1998, Russell Weston shot and killed two police officers in the U.S. Capitol.¹²¹ He claimed that he was the only person who could

¹¹⁷ FBI, 2007 Response to Inquiries, *supra* note 3, at 1.

¹¹⁸ Simpson, *supra* note 110, at 333.

¹¹⁹ *Id.* See also U.S. Dept. of Health and Human Services, Report to the President on Issues Raised by the Virginia Tech Tragedy at 14 (2007), available at <http://purl.access.gpo.gov/GPO/LPS82670> (stating that in order for the NICS to be maximally effective, all states need to submit, or make available, mental health records to the NICS).

¹²⁰ Donna M. Norris et al., Firearm Laws, Patients, and the Roles of Psychiatrists, 163:8 Am. J. Psychiatry 1392, 1393 (2006) (noting that state firearms statutes regarding prohibited persons vary tremendously, and some have no restrictions at all for those with mental illness, thus the Gun Control Act controls). See Simpson, *supra* note 110, at 333 (specifically naming Alaska, Colorado, New Hampshire and Vermont as states with no such restrictions). See generally Joseph R. Simpson, Issues Related to Possession of Firearms by Individuals with Mental Illness: An Overview Using California as an Example, 13:2 J. Psychiatric Practice 109 (2007); Lisa Rein, Mental Records to be Checked in Gun Buys, Wash. Post, (Sept. 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/17/AR2007091701805.html>; Patrick Marley, Senate Passes Bill Requiring Mental Status Check by Gun Dealers, J. Sentinel, (Mar. 2, 2010), <http://www.jsonline.com/news/statepolitics/85979542.html>.

¹²¹ Marilyn Price & Donna M. Norris, National Instant Criminal Background Check Improvement Act: Implications for Persons with Mental Illness, 36 J. Am. Acad. Psychiatry & L. 123, 124 (2008), available at <http://www.jaapl.org/cgi/reprint/36/1/123>; Fox Butterfield, Hole in Gun Control Law Lets Mentally Ill Through, N.Y. Times, April 11, 2000, <http://www.nytimes.com/2000/04/11/us/hole-in-gun-control-law-lets-mentally-ill-through.html?pagewanted=1>.

save the country from destruction by deadly disease and cannibalism.¹²² Weeks before the shooting, he showed up unannounced at CIA headquarters, insisting that President Clinton was a Russian clone.¹²³ He also informed his parents that Clinton had sent an assassin from the Navy Seals to “silence him for good.”¹²⁴ He had previously been committed to a Montana hospital for fifty-three days for paranoid schizophrenia,¹²⁵ but those records were never submitted to the NICS.¹²⁶ As a result, Weston was able to purchase a gun in Illinois.¹²⁷

That same year, Gracie Verduzco bought a .38-caliber revolver in Tucson, Arizona.¹²⁸ She was a paranoid schizophrenic who believed she had a transmitter in her ear that could receive messages via satellite.¹²⁹ She had been involuntarily committed to hospitals by judges in both Arizona and Washington, D.C. on three separate occasions.¹³⁰ She then used the gun to kill one person and wound four others at a post office.¹³¹ Because information regarding her involuntary commitments was never forwarded to NICS, she was able to purchase a gun by lying on her firearm application.¹³²

In 1999, Lisa Duy, a diagnosed paranoid schizophrenic, walked into a Salt Lake City gun shop and bought a Smith & Wesson nine-millimeter semiautomatic pistol.¹³³ Two hours later, she went to the studio of a local television station and killed a young mother and

¹²² Bill Miller, Capitol Shooter's Mind-Set Detailed, Wash. Post, Apr. 23, 1999, <http://www.washingtonpost.com/wp-srv/national/longterm/shooting/stories/weston042399.htm>.

¹²³ Id.

¹²⁴ Id.

¹²⁵ Price & Norris, *supra* note 121, at 124.

¹²⁶ Id.

¹²⁷ See *id.*

¹²⁸ Butterfield, *supra* note 121.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Price & Norris, *supra* note 121, at 124; Butterfield, *supra* note 121.

wounded the building manager.¹³⁴ Unfortunately, this incident could have been avoided had the NICS been given information regarding her previous mental instability and involuntary hospitalization.¹³⁵ She had previously harassed the employees of a local radio station, claiming that a disc jockey had stalked her, could read her mind, had placed a hidden camera inside her home and broadcasted intimate secrets about her personal life.¹³⁶ She was arrested and charged with stalking, assault, carrying a concealed weapon, disorderly conduct and interfering with a police officer.¹³⁷

Instead of prosecuting her, the assistant city attorney proposed a “diversion agreement,” stipulating that if she voluntarily sought mental health treatment and had no further arrests for two years, all charges would be dismissed in 1998.¹³⁸ Duy agreed.¹³⁹ However, a year later she threatened to kill an FBI agent when he refused to help stop local radio and television stations from allegedly broadcasting information about her sex life.¹⁴⁰ She was taken to a mental hospital, where physicians determined she was a danger to others, and was committed for ninety days by a civil court judge.¹⁴¹ The assistant city attorney was unaware of these events, and nothing showed up in the Bureau of Criminal Identification, so the criminal charges against her were dropped a year later.¹⁴² Two months later she committed the shooting at the television station.¹⁴³

This is the unfortunate result of states failing to provide the NICS with relevant mental health information. Shortly after the Duy incident, Utah changed its laws so that it now regularly provides this

¹³⁴ Price & Norris, *supra* note 121, at 124.

¹³⁵ See *id.*

¹³⁶ Butterfield, *supra* note 121.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Butterfield, *supra* note 121.

¹⁴² *Id.*

¹⁴³ *Id.*

information to the NICS.¹⁴⁴ Regrettably, it took a tragic event like this to make that happen.

Finally, in 2007, Seung-Hui Cho was able to pass two separate NICS checks and bought two guns, which he used to kill thirty-three students at Virginia Tech.¹⁴⁵ But as with the above examples, this horrific event could have been prevented had the proper records been sent to the NICS.¹⁴⁶ In 2005, two female students complained to the campus police that Cho was harassing them.¹⁴⁷ At the same time, an acquaintance reported to authorities that Cho was suicidal, and campus police took him to a mental health clinic.¹⁴⁸ The intake officer found him to be mentally ill, and a court magistrate issued a temporary detention order to hold him overnight for evaluation.¹⁴⁹ Cho was observed the next day by a psychiatrist, who declared him mentally ill, but added that he did not pose an imminent danger to himself or others.¹⁵⁰ Despite this finding, a judge deemed Cho a danger to himself and ordered outpatient treatment.¹⁵¹

According to Virginia law, a person is prohibited from purchasing or possessing a firearm if he or she has been adjudicated legally incompetent or mentally incapacitated,¹⁵² or acquitted by reason of insanity and committed to the state mental hospital.¹⁵³ None of these provisions applied to Cho,¹⁵⁴ but under federal law,

¹⁴⁴ Price & Norris, *supra* note 121, at 124.

¹⁴⁵ Christine Hauser & Anahad O'Connor, Virginia Tech Shooting Leaves 33 Dead, N.Y. Times Apr. 16, 2007, <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html>. See also Paul Helmke, NRA Paranoia is Silly, Dangerous; No Need to Outlaw Guns, Just Loopholes, U.S. News & World Rep. (Apr. 20, 2009), <http://www.usnews.com/articles/opinion/2009/04/20/nra-paranoia-is-silly-dangerous-no-need-to-outlaw-guns-just-loopholes.html>.

¹⁴⁶ See Luo, *supra* note 1.

¹⁴⁷ *Id.*; Reynolds & Meyer, *supra* note 1.

¹⁴⁸ Reynolds & Meyer, *supra* note 1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; Luo, *supra* note 1; Price & Norris, *supra* note 121, at 125.

¹⁵² Va. Code Ann. § 18.2-308.1:2 (West 2002).

¹⁵³ Va. Code Ann. § 18.2-308.1:3 (West 2002).

¹⁵⁴ Reynolds & Meyer, *supra* note 1.

Cho would have been ineligible to purchase a firearm.¹⁵⁵ But because nothing was reported to the NICS, Cho fell through the cracks.¹⁵⁶

As a direct result of the gap in communication between states and the federal government, Congress passed the NICS Improvement Amendments Act of 2007,¹⁵⁷ described in the next section.

VI. THE NICS IMPROVEMENT ACT

The NICS Improvement Amendments Act of 2007¹⁵⁸ was signed by President Bush on January 8, 2008.¹⁵⁹ Its purpose is to close the gap in available information to the NICS regarding prohibiting mental health histories that meet the requirements under 922(g)(4).¹⁶⁰ The Act provides incentives to states to submit complete information to the Attorney General by giving grants to state agencies to establish and upgrade information automation and identification technologies.¹⁶¹ The Act also provides for grant penalties for failing to comply with these requirements.¹⁶² After three years, 3 percent of grant funds can be withheld if there is less than 50 percent

¹⁵⁵ *Id.*; Luo, *supra* note 1. See Bureau of Alcohol, Tobacco, Firearms and Explosives, Open Letter to the States' Attorneys General, U.S. Dept. of Just. (May 9, 2007), available at <http://www.atf.gov/press/releases/2007/05/050907-openletter-state-attorneys-general.html> (explaining adjudicated as a mental defective means anyone who has been adjudicated to be a danger to himself or others, and that an adjudication that a person is mentally ill and a danger to himself or others "would result in Federal firearms disability, whether the court-ordered treatment was on an inpatient or outpatient basis." It further states "the adjudication itself is sufficient to trigger the disability").

¹⁵⁶ Reynolds & Meyer, *supra* note 1; Price & Norris, *supra* note 121, at 125; Ian Urbina, Virginia Ends a Loophole in Gun Laws, N.Y. Times (May 7, 2007), available at http://www.nytimes.com/2007/05/01/world/americas/01iht-gun.1.5513410.html?_r=1&scp=1&sq=virginia%20ends%20a%20loophole%20in%20gun%20laws&st=cse.

¹⁵⁷ See BJS, NICS Improvement Amendments Act, *supra* note 5.

¹⁵⁸ BJS, NARIP, *supra* note 4.

¹⁵⁹ BJS, NICS Improvement Amendments Act, *supra* note 5.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

completeness of records; after 5 years, 4 percent can be withheld for less than 70 percent completeness of records; and after 10 years, 5 percent can be withheld for less than 90 percent completeness of records.¹⁶³ These penalties are deferred until 2011, are discretionary from 2011 to 2017, and are mandatory in 2018, although mandatory penalties can be waived if there is substantial evidence that a state is making reasonable efforts to comply.¹⁶⁴ Ten million dollars was set aside for this program in 2009.¹⁶⁵

In order to be eligible to receive grants under the Act, states must meet two requirements. First, a state must provide the Attorney General a “reasonable estimate” of records subject to completeness requirements.¹⁶⁶ Second, a state must implement a program for people with prohibiting mental health histories to obtain relief from firearms disabilities.¹⁶⁷ The relief must be founded on the fact that “the circumstances of the disability and the person’s record and reputation are such that the person will not be likely to act in a manner dangerous to the public safety and that the granting of relief would not be contrary to the public interest.”¹⁶⁸

The Act directly addresses the problem that lead to the Virginia Tech tragedy. However, states are slow to respond,¹⁶⁹ and mandatory penalties will not be imposed until 2018.¹⁷⁰ Therefore, it appears that the information gap will continue to be a problem for at least the next few years.

VII. PITFALLS AND POLICY CONCERNS

There are several issues to consider when it comes to mental

¹⁶³ *Id.*

¹⁶⁴ BJS, NICS Improvement Amendments Act, *supra* note 5.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; BJS, NARIP, *supra* note 4, at 4.

¹⁶⁷ BJS, NICS Improvement Amendments Act, *supra* note 5; BJS, NARIP, *supra* note 4, at 4.

¹⁶⁸ BJS, NICS Improvement Amendments Act, *supra* note 5; BJS, NARIP, *supra* note 4, at 4; 18 U.S.C. § 925(c)(1968).

¹⁶⁹ See *supra* note 5 (only three states were eligible to receive funding under the Act in 2009).

¹⁷⁰ BJS, NICS Improvement Amendments Act, *supra* note 5.

health records and background checks. One of which is the stigmatization associated with labeling mentally ill individuals as violent offenders incapable of handling guns in a safe manner.¹⁷¹ There is a risk that people with mental illnesses may avoid seeking the treatment they need because of such stigmatization.¹⁷² Consequently, there may be a decreased likelihood of reducing violence within this population.¹⁷³

Another issue to think about is that of privacy.¹⁷⁴ People may worry that their mental health records may become public knowledge or otherwise compromised in some way if entered into the NICS. However, the information and records in the NICS are subject to the federal Privacy Act.¹⁷⁵ When the FFL contacts the NICS before the transfer of a firearm to a potential buyer, the NICS only provides one of three responses: proceed, denied or delayed.¹⁷⁶ If a person is denied, neither the reason for doing so nor the general prohibiting category under 922(g) is revealed to the FFL.¹⁷⁷ The only way those specifics can be discovered is if the potential buyer requests the information from the NICS Section of the FBI through an appeal.¹⁷⁸

Additionally, the information in the NICS is used only for background checks under the Brady Act, background checks by federal, state or local agencies for firearms or explosives licenses or permits, and in connection with civil or criminal offenses under the Gun Control Act or the National Firearms Act.¹⁷⁹ Furthermore, information in the NICS cannot be used for general law enforcement

¹⁷¹ See Applebaum, *supra* note 7, at 1320. See also Link et al., *supra* note 23, at 1332–33.

¹⁷² See Link et al., *supra* note 23, at 1332–33; Friedman, *supra* note 7, at 2066; APA, *Access to Firearms*, *supra* note 7 at note 1. See also T.B. Cole, *Efforts to Prevent Gun Sales to Mentally Ill May Defer Patients from Seeking Help*, 298 JAMA 503 (2007).

¹⁷³ See APA, *Access to firearms*, *supra* note 7.

¹⁷⁴ See BJS, *NICS Improvement Amendments Act*, *supra* note 5.

¹⁷⁵ *Id.*

¹⁷⁶ FBI, *Overview of NICS Checks*, *supra* note 3.

¹⁷⁷ BJS, *NICS Improvement Amendments Act*, *supra* note 5.

¹⁷⁸ *Id.*; FBI, *Overview of NICS Checks*, *supra* note 3.

¹⁷⁹ BJS, *NICS Improvement Amendments Act*, *supra* note 5. See 28 C.F.R. § 25.6(j) (2002).

purposes.¹⁸⁰ In fact, the NICS Section of the FBI must destroy all identifying information regarding allowed transfers before the start of the next NICS business day.¹⁸¹ Finally, Section 102 of the NICS Improvement Act provides that the Attorney General must work with the states and the mental health community to establish regulations to protect the privacy of the information in the NICS.¹⁸²

Lastly, it is important to understand that the Gun Control Act, the Brady Act and the NICS Improvement Act only apply to Federal Firearms Licensees, not unlicensed sellers, such as those at gun shows or flea markets.¹⁸³ About 40 percent of guns are bought through the latter unregulated system.¹⁸⁴ Criminals or other prohibited persons who want to avoid a background check can simply buy at these shows, where unlicensed sellers are not held to the strict record-keeping requirements like FFLs.¹⁸⁵ This provides a large secondary market where it is easy for illegal buyers to obtain and traffic guns, furthering the problem of guns getting into the wrong hands.¹⁸⁶ Fortunately, there are solutions to these problems, which are discussed in the next section.

VIII. THE ROAD TO IMPROVEMENT

For the problem of unlicensed gun dealers, there is state legislation already in place that has proven to be effective.¹⁸⁷ In

¹⁸⁰ BJS, NICS Improvement Amendments Act, *supra* note 5.

¹⁸¹ FBI, Overview of NICS Checks, *supra* note 3. See 28 C.F.R. § 25.9(b)(1)(iii)(2009).

¹⁸² BJS, NICS Improvement Amendments Act, *supra* note 5.

¹⁸³ See The Dept. of the Treasury, Dept. of Justice & Bureau of Alcohol, Tobacco and Firearms, Gun Shows: Brady Checks and Crime Gun Traces 1 (1999) [hereinafter Gun Shows].

¹⁸⁴ Brady Ctr. to Prevent Gun Violence, No Check. No Gun. Why Brady Background Checks Should be Required for All Gun Sales 5 (2009) [hereinafter No Check. No Gun.].

¹⁸⁵ See Gun Shows, *supra* note 183, at 1.

¹⁸⁶ "Unlicensed sellers have no way of knowing whether they are selling to a violent felon or someone who intends to illegally traffic guns on the streets to juveniles or gangs. Further, unscrupulous gun dealers can use these free-flowing markets to hide their off-the-book sales. While most gun show sellers are honest and law-abiding, it only takes a few to transfer large numbers of firearms into dangerous hands." *Id.* at 26.

¹⁸⁷ See Cal. Penal Code § 12072(d)(2009).

California, a private, unlicensed seller must take the gun to a licensed seller in order to complete the transaction.¹⁸⁸ A study of the effects of the law has shown that it is successful at preventing straw purchases¹⁸⁹ and undocumented private party sales¹⁹⁰ at gun shows. Further, this would not be a prohibitively expensive solution to the problem because the system used to conduct background checks, the NICS, is already in place.¹⁹¹ If other states passed similar legislation, it would be significantly less likely for prohibited persons, including those with histories of mental illness, to obtain guns.

Another remedy specifically tailored for those who have been adjudicated as a mental defective or involuntarily committed to a mental institution is the creation of state mental health databases.¹⁹² Some states already have these databases, with the criteria varying from state to state.¹⁹³ However, in creating such systems, it is important to determine what criteria are important and can actually help reduce access to firearms by people who are especially vulnerable to violence.

For instance, it may be more helpful to narrow the definition from those simply with mental disorders or hospital commitments to those who have actually had prior episodes of violence, have substance abuse problems, have had a recent commitment based on suicidal ideation or dangerous threats to others, or have even had a period of incarceration based on an episode of violence.¹⁹⁴ These are factors known to be associated with an elevated risk of violence¹⁹⁵ and will likely prove to be more effective than overly broad

¹⁸⁸ Cal. Penal Code § 12082(a)(2009).

¹⁸⁹ Garen J. Wintemute, *Gun Shows Across a Multistate American Gun Market: Observational Evidence of the Effects of Regulatory Policies*, 13 *Injury Prevention* 150, 154 (2007) (finding that 6.6 times fewer straw purchases were made in California compared to Texas, Florida, Arizona and Nevada, where there are no regulations on private, unlicensed gun sales).

¹⁹⁰ *Id.* at 153 (showing no private, undocumented sales were observed at the gun shows in California).

¹⁹¹ See *No Check. No Gun.*, *supra* note 184, at 25.

¹⁹² See Norris et al., *supra* note 120, at 1394; APA, *Access to Firearms*, *supra* note 7, at 1.

¹⁹³ See Norris et al., *supra* note 120, at 1394.

¹⁹⁴ APA, *Access to Firearms*, *supra* note 7 at 2. See Friedman, *supra* note 7, at 2066.

¹⁹⁵ APA, *Access to Firearms*, *supra* note 7, at 1. See also Friedman, *supra* note 7, at 2065.

categories. Accordingly, putting individuals in the database simply because they have been involuntarily committed may not be effective because many people who are committed are done so because they are incapable of functioning on their own and not because they are actually violent or may have violent tendencies.¹⁹⁶ Additionally, tailoring databases based on factors known to correlate with violence may alleviate the stigma associated with labeling those with mental disorders as violent.

One final proposed solution to decrease access to guns by those with mental illnesses is the implementation of state legislation designed to confiscate firearms from those who are deemed dangerous and mentally ill.¹⁹⁷ One way this may be done is through state mental health databases, mentioned previously, in a sort of backwards manner,¹⁹⁸ meaning that guns would be confiscated from those who are already entered into the database. Another method is through state legislation specifically targeted at those individuals in times of especially high risk for violence, such as at the time of involuntary commitment or if they are thought to be an imminent threat.¹⁹⁹ Some states have already implemented laws to address this.²⁰⁰ Indiana and Connecticut, for example, have statutes that allow the police to remove firearms from imminently dangerous people, regardless of whether or not they have a mental illness.²⁰¹ These are particularly viable solutions because they focus directly on dangerousness rather than mental illness, which make them more likely to be effective in reducing firearm violence.²⁰² Moreover, such laws help to de-stigmatize mental illness.²⁰³

¹⁹⁶ APA, Access to Firearms, *supra* note 7, at 2.

¹⁹⁷ *Id.* See also Norris et al., *supra* note 120, at 1394.

¹⁹⁸ See Norris et al., *supra* note 120, at 1394.

¹⁹⁹ APA, Access to Firearms, *supra* note 7, at 2.

²⁰⁰ *Id.* (using California, Indiana and Connecticut as examples).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

IX. CONCLUSION

Although an overall small portion of violence is committed by mentally ill individuals, it is still important to target this population through gun control legislation because such violence is often random and without warning. Of course more violence would be associated with other activities such as drug dealing or gangs, but at least with those activities, violence is somewhat expected when compared to the senseless acts of violence committed by those with mental illnesses, like Seung-Hui Cho and Lisa Duy. Although there were warning signs in those instances, those individuals slipped through the gap between state record reporting and the NICS, resulting in tragedies where the victims were completely unaware of the danger that awaited them.

Simply stated, background checks work. As of 2007, they have prevented more than 1.6 million prohibited persons from purchasing guns.²⁰⁴ But background checks, including those conducted through the NICS, are only as good as the records maintained in the system. States must step up participation in the NICS Improvement Act grant program by updating and automating complete and accurate records of those prohibited from purchasing firearms, and they must transmit those records to the NICS. That way, illegal buyers will be unable to dodge the background check system if they attempt to buy a firearm in another state.

It is also imperative that the large loophole allowing prohibited individuals to buy firearms through unlicensed dealers at gun shows be closed, or at least tightened. This can be accomplished by implementing state legislation like that of California, mandating background checks for all gun sales by requiring unlicensed dealers to take guns to licensed dealers to complete the firearms transfer. This would impose no extra financial burden on the states, thus making it a more practical solution.

Finally, states can also create mental health databases that are narrowly tailored to include risk factors known to be associated with heightened risk of violence, such as concurring substance abuse and past incidents of violence. This may be a costly solution, but states

²⁰⁴ No Check. No Gun., *supra* note 184, at 7.

may be able to shape such a database to the record-keeping requirements of the NICS Improvement Act, thus being eligible to receive federal funds to set up the database. However, if a state does not wish to do this, or perhaps wishes to make further efforts to curb access to guns by those with mental illness, the state legislature can enact legislation allowing for appropriate authorities to confiscate firearms from those who are an imminent threat to themselves or others. This solution would be less costly, and would also promote the public policy goal of reducing the stigma surrounding mental illness, which could encourage more people with mental disorders to seek the treatment they need.