

Gun Laws and Mental Illness: Ridding the Statutes of Stigma

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A man takes aim at people gathered in a public place, killing large numbers of them. In the hours, days, and weeks to come, police, politicians, and the media insist that he must have been mentally ill. This presumed link between mental illness and violence is so unquestioned that it is enshrined in federal and state laws that prohibit people with mental illness from possessing guns. But this assumption is deeply wrong.

This Article lays bare the lack of evidence connecting mental health conditions to violent acts and argues that mental illness gun bans do nothing more than reinforce the harmful trope that people living with a mental health condition are intrinsically dangerous. These laws, which prohibit people with certain indicia of mental health conditions from purchasing or possessing firearms, fail at their supposed goal of preventing guns from getting into the hands of dangerous people. They define the prohibited group in ways that both include many individuals who will never be violent and exclude many individuals who pose a risk. Moreover, this focus on mental illness distracts lawmakers from traits that better predict violence, such as past violent acts and substance abuse.

The danger stigma has real consequences: It makes employers less likely to hire individuals with mental illness, landlords less likely to rent to them, and legislators less likely to allocate money to programs to serve them. It also makes police more likely to arrest or shoot them.

Because mental illness gun bans do not accomplish their goals and instead impose deep psychological and societal harms, they should be discarded in favor of laws that focus on stronger predictors of violence.

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“I hope to hell that they find when they do the autopsy that there’s a tumor in his head or something,” Eric Paddock told reporters, “because if they don’t, we’re all in trouble.”¹

INTRODUCTION

When Stephen Paddock took aim out the window of the Mandalay Bay Resort and Casino in Las Vegas, no medical professional had diagnosed him with a mental illness. Yet after he murdered fifty-nine attendees of a country music festival and injured over 800 others, police officers, journalists, and pundits all insisted that he must have had a mental health condition.

In the hours after the shooting, the Las Vegas mayor called Paddock a “crazed lunatic full of hate”;² the sheriff in charge described him as a “psychopath.”³

¹ See Elif Batuman, *Searching for Motives in Mass Shootings*, NEW YORKER (Nov. 27, 2017), <https://www.newyorker.com/news/daily-comment/searching-for-motives-in-mass-shootings> [https://perma.cc/HPZ6-523D] (discussing Paddock’s brother, Stephen Paddock, who killed fifty-nine people in a shooting in Las Vegas).

² John Bacon & Mike James, *Las Vegas Shooting: At Least 59 Dead, Gunman Was ‘Crazed Lunatic Full of Hate,’* USA TODAY (Oct. 2, 2017), <https://www.usatoday.com/story/news/nation/2017/10/02/las-vegas-shooting/722191001/> [https://perma.cc/HY28-LLND].

³ Lynh Bui et al., *At Least 59 Killed in Las Vegas Shooting Rampage, More Than 500 Others Injured*, WASH. POST (Oct. 2, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/10/02/police-shut-down-part-of-las-vegas-strip-due-to-shooting/> [https://perma.cc/H44W-83ND].

Days went by with no evidence that Paddock had a mental health condition, yet police continued to assume that his mind was unwell. “Las Vegas shooter Stephen Paddock likely had a severe mental illness that was probably undiagnosed,” read the first sentence in one story.⁴

No one could believe that mental health was not at the root of the murders. When a reporter asked the police department undersheriff if Paddock had shot these people simply because he could, the undersheriff answered: “That’s certainly a possibility but it’s one of those possibilities you really can’t wrap your mind around. I don’t know if I can accept that.”⁵

The narrative of the dangerous lunatic prevails after nearly every mass shooting event, as evidenced by the public conversation in the wake of the recent shootings in El Paso and Dayton, Ohio. Political leaders immediately turned to mental health as a cause of such violence, without citing to any evidence that either shooter suffered from a diagnosed mental health condition.⁶

This search for a reason is all too human. We need motives when people commit bad acts so that we can understand what led them to do what they did and distance ourselves from it.⁷ When no motive makes itself apparent, the shooter must have been mentally ill. The alternative—that all humans are capable of violence, and some are capable of it on a horrific scale, and we never know who is dangerous and who is not—is terrifying.

Insisting that mental illness must be at the root of senseless, violent acts is both untrue (mental illness accounts for, at most, a tiny sliver of violent activity⁸)

⁴ Jeff Farrell, *Stephen Paddock: Investigators ‘Believe Las Vegas Shooter Had Severe Mental Illness that Was Likely Undiagnosed,’* INDEPENDENT (Oct. 9, 2017), <https://www.independent.co.uk/news/world/americas/stephen-paddock-severe-mental-illness-undiagnosed-fbi-investigators-las-vegas-shooting-a7990021.html> [<https://perma.cc/9S54-QU4E>].

⁵ *Id.*

⁶ See, e.g., Michael Crowley & Maggie Haberman, *Trump Condemns White Supremacy but Stops Short of Major Gun Controls,* N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/us/politics/trump-speech-mass-shootings-dayton-el-paso.html> [<https://perma.cc/Q27C-NDZU>] (quoting President Trump calling perpetrators of mass shootings “mentally ill monsters”); Susan Collins (@SenatorCollins), TWITTER (Aug. 4, 2019, 9:21 AM), <https://twitter.com/SenatorCollins/status/1158198526574305280> [<https://perma.cc/9S54-QU4E>] (stating, in the wake of the Dayton, El Paso, and Gilroy shootings, “I have long supported closing loopholes in background checks to prevent the sale of firearms to . . . individuals with serious mental illness”).

⁷ See, e.g., William Wan & Mark Berman, *‘I’m Constantly Asking: Why?’ When Mass Shootings End, the Painful Wait for Answers Begins,* WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/national/im-constantly-asking-why-when-mass-shootings-end-the-painful-wait-for-answers-begins/2018/03/15/6fb0347e-1d8a-11e8-b2d9-08e748f892c0_story.html [<https://perma.cc/JN72-2DHP>].

⁸ See *infra* Part I (discrediting the myth that mental illness is a predictor of violent behavior).

and stigmatizing.⁹ Nevertheless, this assumed connection has been enshrined in laws that ban the purchase or possession of firearms by people living with a mental illness.¹⁰ These mental illness gun bans do little to prevent violence and serve only to legitimate the false but widespread belief that individuals with mental illness are more dangerous than others.

Scholars have previously recognized the ineffectiveness of laws restricting access to firearms by individuals living with mental health conditions,¹¹ and suggested reforms designed to strengthen current laws.¹² This Article goes further. I argue that categorically denying individuals with mental illness access to guns does not reduce gun violence. Instead, such a ban legitimates the harmful and inaccurate trope that these individuals are dangerous. Because mental illness gun bans accomplish little and instead impose deep psychological and societal harms, they should be repealed.

Moreover, a focus on mental health status distracts from better predictors of dangerousness—past violent acts or substance abuse. A no-possession law tailored to these traits would more effectively protect the public without furthering the stigma against those living with mental health conditions.

This Article tackles these issues in five Parts. First, I discuss the myths and the realities of gun violence and mental illness. Because mass shootings drive most gun safety legislation, laying bare the relationship—or lack thereof—between these acts and mental illness is crucial to understanding the effectiveness of current gun laws. I further note that the relationship between mental illness and everyday gun violence, which takes a far greater toll in the United States than mass shootings, is even weaker than the purported links between mass shootings and mental illness.

⁹ See *infra* Part III (discussing the negative consequences of stigmatizing mental illness).

¹⁰ See *infra* Part II (providing an overview of mental illness gun bans that have been implemented in many states).

¹¹ See, e.g., Laurie R. Martinelli, *Separating Myth from Fact: Unlinking Mental Illness and Violence and Implications for Gun Control Legislation and Public Policy*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 359, 369-70 (2014) (criticizing the “ineffective and inconsistent” mechanisms embedded in federal gun law).

¹² See, e.g., Jana R. McCreary, “Mentally Defective” Language in the Gun Control Act, 45 CONN. L. REV. 813, 854-63 (2013) (arguing for reforms, such as requiring purchasers to present a certificate of mental health to purchase a gun, that would prevent the “dangerously mentally ill” from purchasing and possessing firearms); Katherine L. Record & Lawrence O. Gostin, *A Robust Individual Right to Bear Arms Versus the Public’s Health: The Court’s Reliance on Firearms Restrictions on the Mentally Ill*, 6 CHARLESTON L. REV. 371, 383 (2012) (proposing reforms to federal law, including closing the gun show loophole for background checks and ensuring such checks are rapid and reliable); Fredrick E. Vars, *Symptom-Based Gun Control*, 46 CONN. L. REV. 1633, 1636-39 (2014) (discussing the weaknesses of current policies that restrict gun ownership and arguing for a “symptoms-based approach” that allows a “police officer or mental health professional who observes an individual suffering from delusions or hallucinations . . . to confiscate that person’s firearms and to add that person’s name to the federal background check system”).

Second, I describe the details of the mental illness gun bans and show how they fail in their objective of preventing dangerous people from obtaining guns.

Third, I illustrate the harm the dangerousness stigma does to people living with mental illness. These individuals are arrested at higher rates, have a difficult time finding housing and employment, and fail to obtain treatment because their condition has been stigmatized.

Fourth, I address the reasons why mental illness gun bans are so widespread. These laws seem like good policy on their face, and I grapple with their justifications and point out the flaws in the reasoning behind them.

Fifth and finally, I point to other indicia of dangerousness that would both better achieve the goal of stemming gun violence in the United States and avoid stigmatizing individuals living with mental illness.

I. GUN VIOLENCE AND MENTAL ILLNESS

In the wake of a mass shooting, gun safety and gun rights advocates agree on little, but both sides acknowledge that guns should not be in the hands of “dangerous” people.¹³ Almost without fail, the ranks of the “dangerous” include

¹³ For just one example of mental health as a conservative talking point, see, e.g., Ari Ne’eman, *Trump Was Right to Lift a Rule Preventing Some People with Disabilities from Buying Guns*, VOX (Feb. 19, 2018, 1:48 PM), <https://www.vox.com/the-big-idea/2017/2/6/14522132/gun-control-parkland-disabilities-republicans-nra-obama-liberty> [https://perma.cc/Q2BK-9KC4] (“After the horrific shootings in Parkland, Florida, last week, President Donald Trump said very little about gun policy—but quite a bit about mental health. This has become a common move for many in the GOP, who hope to deflect a growing wave of pressure for stronger gun control laws.”). Or, as a more inflammatory example, columnist Ann Coulter in the wake of the Sandy Hook shooting wrote an article titled, “Guns Don’t Kill People, the Mentally Ill Do.” Ann Coulter, *Guns Don’t Kill People, The Mentally Ill Do*, ANN COULTER (Jan. 16, 2013), <http://www.anncoulter.com/columns/2013-01-16.html> [https://perma.cc/24SS-PV56].

For an example of progressive action on mental health after a mass shooting, see, e.g., OFFICE OF THE PRESS SEC’Y, THE WHITE HOUSE, FACT SHEET: NEW EXECUTIVE ACTIONS TO REDUCE GUN VIOLENCE AND MAKE OUR COMMUNITIES SAFER (2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our> [https://perma.cc/F4Y8-PLEC] (outlining efforts to “increase mental health treatment and reporting to the background check system”). In the waning days of President Obama’s second term, the Social Security Administration finalized a rule to prevent gun purchases by individuals who receive social security disability benefits, have a mental disability, and use a representative payee for their benefit payments. Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91,702 (Dec. 19, 2016). Congress overturned the rule before it was scheduled to take effect. Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Social Security Administration Relating to Implementation of the NICS Improvement Amendments Act of 2007, Pub. L. No. 115-8 (2017).

individuals with mental illness.¹⁴

This supposed connection between violence and mental illness is not solely the province of media pundits. Congress and the courts have also legitimized the connection. When the Supreme Court dismantled the District of Columbia’s handgun ban as unconstitutional under the Second Amendment, it noted that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill.”¹⁵ When passing the federal Gun Control Act, which originally put a mental illness gun ban in place, one legislator stated, “No one can dispute the need to prevent . . . mental incompetents [and] persons with a history of mental disturbances. . . from buying, owning, or possessing firearms.”¹⁶

These restrictions are not nearly as reasonable as the Court and Congress assumed.¹⁷ The supposed connection between mental illness and violence is cemented by media coverage, exploited by politicians, and embedded in our gun laws. It is also deeply false.

The evidence instead shows that only a handful of the individuals who have committed mass shootings showed signs of mental illness beforehand. While in retrospect, we may want to categorize all of these individuals as “mentally ill”—and we think any reasonable definition of that term must include a person who would murder multiple strangers for no reason—very few of these perpetrators met the diagnostic criteria for a serious mental illness before the shooting. And even those who were diagnosed as mentally ill often had other signals in their

¹⁴ The tide may be turning on this point in the wake of the El Paso shooting, after President Trump’s remarks linking mental illness and gun violence. Many media reports after the shooting questioned the assertion that mental illness caused violent acts, and the American Psychiatric Association and Bazelon Center for Mental Health Law both produced statements condemning the connection as unfounded. *See, e.g.*, Nsikan Akpan, *Why Mental Illness Can’t Predict Mass Shootings*, PBS NEWSHOUR (Aug. 17, 2019, 8:12 PM), <https://www.pbs.org/newshour/science/why-mental-illness-cant-predict-mass-shootings> [<https://perma.cc/VR3U-Y2FH>] (arguing that psychological profiles cannot accurately predict mass shootings); Press Release, Am. Psychiatric Ass’n, *APA Condemns Loss of Life from Gun Violence, Disputes Link to Mass Shootings* (Aug. 5, 2019), <https://www.psychiatry.org/newsroom/news-releases/apa-condemns-loss-of-life-from-gun-violence-disputes-link-to-mental-illness> [<https://perma.cc/W2ZD-SKE2>] (discrediting rhetoric that links gun violence to mental illness); Press Release, Judge David L. Bazelon Ctr. for Mental Health Law, *Bazelon Center Statement on Recent El Paso, Texas and Dayton, Ohio Shootings* (Aug. 5, 2019), <http://www.bazelon.org/wp-content/uploads/2019/08/8-5-2019-Bazelon-Center-Statement-on-El-Paso-TX-and-Dayton-OH-Shootings.pdf> [<https://perma.cc/K92L-SPDT>] (condemning “the efforts of some to conflate hatred, bigotry and racism with mental illness”).

¹⁵ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

¹⁶ 114 CONG. REC. 21,784 (1968) (statement of Rep. Celler).

¹⁷ That said, I do not argue that these restrictions are prohibited under the Second Amendment. Such a conversation is outside the scope of this Article. Instead, my focus is on the normative value of these laws in light of the harm they cause individuals with mental illness.

background—past violent acts or substance abuse problems—that are more closely correlated with violence than mental illness.

Regardless of mental health status, nearly every perpetrator of a mass shooting harbored resentment and extreme anger, which are better indicators of the individual’s propensity to commit this type of violence. In short, mental health status alone does not predict who will turn violent in an especially public way.

When we broaden our lens to look past mass shootings, we find that the link between gun violence and individuals with mental illness weakens even further. Individuals living with a mental health condition are no more likely to be violent than their neighbors.

A. *The Myth*

Stephen Paddock had never been diagnosed with a mental illness when he shot and killed fifty-nine people at a music festival in Las Vegas.¹⁸ Yet, when asked about motive, the sheriff leading the investigation said, “I can’t get into the mind of a psychopath.”¹⁹ Speaker of the House Paul Ryan pivoted immediately to a mental health cause: “[M]ental health reform is a critical ingredient to making sure we can try and prevent some of these things from happening.”²⁰

In the week after the shooting, investigators speculated that Paddock had a “severe mental illness” that was likely undiagnosed: “The portrait, gleaned from interviews with hundreds of people interviewed over the past week, is that while Paddock might have been financially successful, he had real difficulty interacting with people. He is described as standoffish, disconnected, a man who had difficulty establishing and maintaining meaningful relationships.”²¹ The article makes no mention of what “severe mental illness” has these symptoms.

Even months later, after a scan of Paddock’s brain showed no abnormalities and no history of mental illness had emerged,²² a news story analyzing the

¹⁸ See Batuman, *supra* note 1 (noting that “Paddock apparently exhibited . . . no symptoms of mental illness”).

¹⁹ Bui et al., *supra* note 3.

²⁰ Rebecca Shabad, *Paul Ryan Says Mental Health Reform Is “Critical Ingredient” in Stopping Mass Shootings*, CBS NEWS (Oct. 3, 2017, 12:44 PM), <https://www.cbsnews.com/news/paul-ryan-says-mental-health-reform-is-critical-ingredient-in-stopping-mass-shootings> [<https://perma.cc/3QVL-YSQD>].

²¹ Pierre Thomas, *Investigators Believe Las Vegas Gunman Had Severe Undiagnosed Mental Illness: Sources*, ABC NEWS (Oct. 7, 2017, 6:32 PM) <https://abcnews.go.com/US/investigators-las-vegas-gunman-severe-undiagnosed-mental-illness/story?id=50346433> [<https://perma.cc/7XHJ-3DQU>].

²² See, e.g., Sheri Fink, *Las Vegas Gunman’s Brain Exam Only Deepens Mystery of His Actions*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/us/las-vegas-attack->

investigation report of the shooting focused on Paddock’s mental health, noting that his primary care doctor—not a psychiatrist—believed he had bipolar disorder and had prescribed him diazepam, a common anti-anxiety medication.²³ The article even cites to drugabuse.com in noting that diazepam can cause aggressive behaviors but provides no evidence either that the drug can provoke premeditated murders or that Paddock ever took the medication.²⁴

This kind of speculation about mental illness, even in the absence of any evidence, is rife after a mass shooting.²⁵ The mere fact of the carnage supports

paddock-brain-autopsy.html [https://perma.cc/V7K6-NM6F] (“Stephen Paddock . . . had not had a stroke, brain tumor or a number of other neurological disorders that might have helped explain his actions . . .”). Though Paddock’s brain scan showed some signs of abnormalities, experts remain unsure about their cause. *Id.*

²³ Colton Lochhead, *Las Vegas Shooting Report Explores Gunman’s Mental Health*, LAS VEGAS REV.-J. (Jan. 19, 2018, 8:13 PM), <https://www.reviewjournal.com/crime/shootings/las-vegas-shooting-report-explores-gunmans-mental-health> [https://perma.cc/5B3W-DQJ2].

²⁴ *Id.* Diazepam, the generic name for Valium, is one of the most prescribed drugs in the United States. *See, e.g.*, ANDREA TONE, *THE AGE OF ANXIETY: A HISTORY OF AMERICA’S TURBULENT AFFAIR WITH TRANQUILIZERS* 153 (2008) (“Valium rapidly became a staple in medicine cabinets, as common as toothbrushes and razors.”); Arnie Cooper, *An Anxious History of Valium*, WALL ST. J. (Nov. 15, 2013, 7:30 PM), <https://www.wsj.com/articles/an-anxious-history-of-valium-1384547451> [https://perma.cc/J7D3-5YAS] (“Approved by the Food and Drug Administration in 1963, F. Hoffmann-La Roche’s drug, marketed to ‘reduce psychic tension,’ went on to become the Western world’s most widely prescribed answer to anxiety—and the first drug to reach \$1 billion in sales.”). The side effect of “aggressive behaviors” is rare and studies have reached conflicting results on whether it even exists. Furthermore, the aggression observed during these studies was sudden fits of rage, not violent acts of meticulous planning. *See* Robert Kellner, *Unwanted Effects of Minor Tranquilizers and Hypnotics*, 5 *PSYCHIATRIC ANNALS*, Nov. 1975, at 43, 44 (“The findings can be summed up as follows: In normal volunteers, chlordiazepoxide increases hostility; unexpected outbursts of rage have been reported in patients taking chlordiazepoxide and diazepam, but these are rare.”); Jari Tiihonen et al., *Psychotropic Drugs And Homicide: A Prospective Cohort Study From Finland*, 14 *WORLD PSYCHIATRY* 245, 246 (2015) (finding that “benzodiazepine and analgesic use was linked with a higher risk of homicidal offending, and the findings remained highly significant even after correction for multiple comparisons,” but noting that the study’s results likely could not be generalized “to countries with higher rates of organized and premeditated crime”). Chlordiazepoxide is an anti-anxiety medication similar to diazepam; both drugs are classified as benzodiazepines. *See, e.g.*, *JOHNS HOPKINS PSYCHIATRY GUIDE, BENZODIAZEPINES* (Dec. 19, 2016), https://www.hopkinsguides.com/hopkins/view/Johns_Hopkins_Psychiatry_Guide/787140/all/Benzodiazepines. Even if diazepam were somehow linked to mass shootings, there is no evidence Paddock took the medication, only that he was prescribed it.

²⁵ *See, e.g.*, Matthew E. Hirschtritt & Renee L. Binder, *A Reassessment of Blaming Mass Shootings on Mental Illness*, 75 *J. AM. MED. ASS’N PSYCHIATRY* 311, 311 (2018) (describing the tendency of “policy makers, journalists, and the public” to link mental illness to mass shootings); Miranda Lynne Baumann & Brent Teasdale, *Severe Mental Illness and Firearm Access: Is Violence Really the Danger?*, 56 *INT’L J.L. & PSYCHIATRY* 44, 48 (2018) (“In the wake of major gun violence events in the United States, popular discourse inevitably implicates firearm access among individuals with severe mental illness as a major contributing factor to the nation’s gun violence epidemic. We found no support for this claim.” (citations omitted)).

a conclusion that the shooter was mentally ill.²⁶ Only the “psychopaths”²⁷ and the “deranged”²⁸ would commit such a terrible act, we tell ourselves.²⁹

This simplistic explanation both is unsupported by the data, as I demonstrate in more detail in the following section, and elides the complexities of mental illness. Mental illness, as conceived of and categorized in the Diagnostic and Statistical Manual, is as multifaceted a term as physical illness. It is comprised of a host of individual diagnoses, ranging from schizophrenia to eating disorders.³⁰ There is no diagnosis for “mass shooter,” and even a violent act is not generally a symptom of a particular mental illness unless it is part of a pattern of such acts and accompanied by feelings of remorselessness and lack of empathy for others.³¹

²⁶ See David Tarrant, *Despite Popular Belief, It's Hard to Find a Direct Link Between Mental Illness and Mass Shootings Like Orlando's*, DALL. MORNING NEWS (Jun. 15, 2016, 1:40 PM), <https://www.dallasnews.com/news/2016/06/15/despite-popular-belief-its-hard-to-find-a-direct-link-between-mental-illness-and-mass-shootings-like-orlandos/> [<https://perma.cc/VJX2-N8NK>] (“When you see shootings like those at Newtown, Conn., or Aurora, Colo., it’s hard to argue that mental illness didn’t play a role,” [said Jonathan Metz, a professor of sociology and psychiatry at Vanderbilt University]. But the shooter’s mental state is only one of several factors involved, he said.”).

²⁷ “Psychopath” is not a diagnosis in the Diagnostic and Statistical Manual, *see generally* AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5], but it is common shorthand for one who is mentally ill, *see* PHILIP T. YANOS, WRITTEN OFF: MENTAL HEALTH STIGMA AND THE LOSS OF HUMAN POTENTIAL 60-61 (2018) (noting that the New York Post used the terms “psycho,” “schizo,” and “madman” as synonymous with violence).

²⁸ See, e.g., Samantha Raphelson, *What We Know about the Alleged Texas High School Shooter*, NPR (May 19, 2018, 6:22 PM), <https://www.npr.org/sections/thetwo-way/2018/05/19/612468377/what-we-know-about-dimitrios-pagourtzis-the-alleged-texas-high-school-shooter> [<https://perma.cc/LCG5-JZP3>] (quoting one student who said Santa Fe High School shooter Dimitrios Pagourtzis “looks like a psychopath”); Andrew Restuccia, *Trump: Texas Shooting Result of ‘Deranged Individual,’ ‘Isn’t a Guns Situation,’* POLITICO (Nov. 6, 2017, 2:16 PM), https://www.politico.eu/article/trump-texas-shooting-result-of-deranged-individual-isnt-a-guns-situation/?lo=ap_b1 [<https://perma.cc/UZ53-HXME>] (quoting Trump describing Sutherland Springs shooter Devin Kelley as “deranged”); Jacob Rodriguez & Heather Crawford, *Community Still Mourns 1 Year After Pulse Nightclub Massacre*, CBS19 (Jun. 12, 2017, 4:18 PM), <https://www.cbs19.tv/article/news/nation-now/orlando-shooting/community-still-mourns-1-year-after-pulse-nightclub-massacre/77-447434546> [<https://perma.cc/5W3C-WTHJ>] (describing Pulse Nightclub shooter Omar Mateen as a “psychopath with a rifle”).

²⁹ See, e.g., NAT’L COUNCIL FOR BEHAVIORAL HEALTH, MASS VIOLENCE IN AMERICA: CAUSES, IMPACTS AND SOLUTIONS 5 (2019), https://www.thenationalcouncil.org/wp-content/uploads/2019/08/Mass-Violence-in-America_8-6-19.pdf [<https://perma.cc/2ZFU-S34W>] (“Since it is difficult to imagine that a mentally healthy person would deliberately kill multiple strangers, it is commonly assumed that all perpetrators of mass violence must be mentally ill.”).

³⁰ DSM-5, *supra* note 27.

³¹ See *id.* at 659-63 (defining antisocial personality disorder).

Blaming “mental illness” for mass shootings thus is nonsensical. It would be like blaming “physical illness” for death. Such a statement tells us nothing about the specific behaviors that could be predictors of violent behavior or the causal pathways that supposedly connect mental illness with violent acts. It serves only to make the perpetrator an “other,” to separate him from the rest of society, using the language of mental health.³²

This narrative has corrosive effects on the millions of individuals living with mental illness. Connecting mental illness and mass shootings hardens public attitudes against individuals with mental illness and further ingrains stigma in the public discourse and in the legal landscape. One study found that in the weeks following a shooting perpetrated by an individual with serious mental illness, news stories usually mentioned dangerous people as the cause of violence instead of dangerous weapons.³³ This type of news coverage “may lead the public to view [serious mental illness] as an important cause of gun violence, when in reality other factors—such as criminals’ easy access to firearms—are more strongly associated with violent crime.”³⁴

The policy conversations held in the wake of these events also reinforce the connection between dangerous people and mass shootings. Proposed legislation to prevent mass shootings inevitably involves restrictions on the ability of people with mental health conditions to obtain firearms, regardless of whether the shooter actually suffered from a diagnosed serious mental illness.

For example, almost immediately after a shooter killed seventeen people at Marjory Stoneman Douglas High School in Parkland, Florida, gun safety advocates and legislators called for restrictions on the sale of firearms to people with mental health conditions as a way to prevent such shootings in the future.³⁵ The law eventually incorporated a prohibition on the purchase or possession of firearms by one who has been “adjudicated mentally defective” or committed

³² See MICHAEL PERLIN, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* 36 (2000) (noting that associating mental illness and violence “allow[s] us to use the label of ‘sickness’ as reassurance that the other . . . is not like us”).

³³ See Emma E. McGinty et al., *News Media Framing of Serious Mental Illness and Gun Violence in the United States, 1997–2012*, 104 AM. J. PUB. HEALTH 406, 411 (2014) (finding “[a] higher proportion of news stories mentioned dangerous people with [serious mental illness] as opposed to dangerous weapons as the cause of gun violence”).

³⁴ *Id.*

³⁵ See Susan Ferrechio, *Paul Ryan: Congress Should Focus on Mental Health and Background Checks, Not Gun Ban*, WASH. EXAMINER (Feb. 27, 2018), <http://www.washingtonexaminer.com/paul-ryan-congress-should-focus-on-mental-health-and-background-checks-not-gun-ban/article/2650142> [<https://perma.cc/6CA2-YXVC>] (quoting Paul Ryan calling for Congress to emphasize mental health and fixing the background check system); Eric Levenson, *These Are the Gun Bills Florida Lawmakers Are Debating After the Parkland Massacre*, CNN (Feb. 28, 2018), <https://www.cnn.com/2018/02/27/politics/fl-bills-guns-parkland-shooting/index.html> [<https://perma.cc/V934-RQVR>] (referencing efforts by Florida lawmakers to pass a mental health bill in the wake of the Parkland shooting).

to a mental health facility.³⁶ The shooter himself, who had never stayed in a mental health facility or appeared before a judge as a result of a mental health condition, would not have been prevented from buying a firearm under such restrictions.³⁷

As the news media and legislatures draw these links between mental illness and violence, the fear of individuals with mental illness grows stronger. For example, in one study, individuals who read a news story about a mass shooting committed by an individual with serious mental illness were more likely to believe that *all* people with serious mental health conditions were dangerous.³⁸ Thus, every time a news report implicitly blames mental illness as the cause of a violent act, every time a legislature passes a law on mental health issues in a bill designed to address gun violence, the public sees its fear of individuals with mental illness as justified, and the association grows.

B. *The Facts*

Yet the myth that those who suffer from mental illnesses are dangerous is not supported by the data. When we look to mass shootings, some weak links do appear connecting individuals suffering from symptoms of mental illness and these tragic events. But there is not a direct line between mental illness and mass shootings; the correlation has varied significantly across studies, even disappearing altogether in some analyses. Moreover, even when the correlation exists, mental illness may not be the main driver of mass shooting events. Other correlates—especially feelings of resentment and entitlement—are more closely associated with random public violence.

When we broaden our scope to look not just at the rare mass shooting event but at the much larger problem of gun violence overall, the links between mental illness and violence disappear almost entirely. Better predictors of gun violence are past violent acts or a history of substance abuse.

³⁶ Marjory Stoneman Douglas High School Public Safety Act, S. 7026, § 10, 2016 Sen., Reg. Sess. (Fl. 2018).

³⁷ See Phil McCausland, *Florida Mental Health Agency Examined Cruz in 2016, Didn't Hospitalize Him*, NBC NEWS (Feb. 19, 2018, 7:51 PM), <https://www.nbcnews.com/news/us-news/social-media-post-led-florida-agency-investigate-nikolas-cruz-2016-n849221> [<https://perma.cc/C9A3-ZLR9>] (noting that Cruz had not been hospitalized, implicitly leaving him outside the scope of the relevant prohibition).

³⁸ See Emma E. McGinty et al., *Effects of News Media Messages about Mass Shootings on Attitudes toward Persons with Serious Mental Illness and Public Support for Gun Policies*, 170 AM. J. PSYCHIATRY 494, 498-99 (2013) (concluding that these results confirmed the suspicion that news depictions of violent people with mental illness contributed to the public's negative attitudes about all people living with serious mental health conditions); see also Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 367 (2015) (“The public perception of a strong link between mental illness and violence is fueled in part by news coverage of mass shootings and other violent events.”).

1. Mass Shootings³⁹

The link between mass shootings and mental illness is far more modest than the conversations in the wake of a mass shooting would suggest, appearing in some studies, disappearing in others, and never conclusively pinpointing mental illness as a cause. One review of the literature noted, “Psychiatric illness, although present in some mass murderers and mass shooters, is far from the most significant or consistent finding from attempts to investigate the nature of these deeply troubling events.”⁴⁰

In the following pages, I tease out the themes from these studies, beginning with those that show no links between mental illness and mass shootings before moving on to those where some connections appeared.

We begin with a recent FBI study of active shooter⁴¹ incidents.⁴² Of the sixty-three active shooters sampled, only three had been diagnosed with a psychotic disorder at the time of the study.⁴³ A greater spectrum of these shooters, twenty-five percent, had been diagnosed with a mental illness of some kind.⁴⁴ Aside from the three shooters who were diagnosed with a psychotic disorder, twelve active shooters had been diagnosed with a mood disorder, such as depression, four had been diagnosed with an anxiety disorder, and two had

³⁹ Definitions of the term “mass shooting” vary widely, but since my focus is on the events that garner media coverage and drive the conversation on gun policy, I will adopt the definition used by *Mother Jones* in its mass-shootings compilation, which is designed to focus on public mass murders, rather than all murders with a high body count: “four or more victims killed in an indiscriminate public rampage.” Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Aug. 31, 2019), <https://www.motherjones.com/politics/2012/07/mass-shootings-map/> [<https://perma.cc/R7JZ-JEK5>]; see also Mark Follman, *No, There Has Not Been a Mass Shooting Every Day This Year*, MOTHER JONES (Dec. 18, 2015), <https://www.motherjones.com/politics/2015/12/no-there-were-not-355-mass-shootings-this-year/> [<https://perma.cc/46XR-DXGS>].

⁴⁰ James L. Knoll & George D. Annas, *Mass Shootings and Mental Illness*, in GUN VIOLENCE AND MENTAL ILLNESS 83 (2016).

⁴¹ These researchers defined an “active shooter” as one engaged in killing or attempting to kill people in a populated area and identified 160 such incidents from between 2000 and 2013. FED. BUREAU OF INVESTIGATION, A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013, at 5 (2013). While there is some overlap between these events and the *Mother Jones* “mass shooter” definition, the two are not entirely coextensive because the FBI counts events with fewer victims as “active shooter” incidents. *Id.* From their original list, the FBI culled the sixty-three shooters: (1) for whom there was an adequate law enforcement record to determine motivations and pre-attack behaviors, and (2) who planned their attacks in advance. FED. BUREAU OF INVESTIGATION, A STUDY OF THE PRE-ATTACK BEHAVIORS OF ACTIVE SHOOTERS 8 (2018).

⁴² *Id.* at 26.

⁴³ *Id.* at 17.

⁴⁴ *Id.*

been diagnosed with personality disorders.⁴⁵

These mental illnesses have little in common symptomatically. A psychotic disorder involves a problem with cognition or thinking; the individual hears things that are not there or believes things that are not true.⁴⁶ Individuals suffering from mood or anxiety disorders have elevated emotional states; their emotions interfere with their daily lives.⁴⁷ And an individual with a personality disorder has an “enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual’s culture,” which cannot be explained through a diagnosis of another type of mental illness.⁴⁸

Because these mental disorders manifest so differently, it is difficult to conclude that “mental illness” is the driver of active shootings. The psychotic symptoms experienced by the person living with schizophrenia are not necessarily shared by those with mood or personality disorders.⁴⁹ If one with schizophrenia shoots because he is hallucinating, then that cause fails to explain why a person with depression shoots or why an individual with antisocial personality disorder shoots.⁵⁰

Moreover, while the fact that twenty-five percent of shooters suffered from a diagnosed mental illness may seem to indicate a high correlation between such

⁴⁵ *Id.* While these numbers add up to more than twenty-five percent, some of the perpetrators had co-occurring mental health conditions, meaning that one person had been diagnosed with more than one mental illness.

⁴⁶ The hallmark of psychotic disorders like schizophrenia is a symptom of malfunctioning thinking, such as delusions, hallucinations, or disorganized speech. DSM-5, *supra* note 27, at 87-88.

⁴⁷ To be diagnosed with major depression, for example, individuals must experience at least five symptoms every day for a two-week period or more; symptoms include frequent thoughts of death, significant unintentional weight gain or loss, fatigue, insomnia, inability to concentrate, diminished pleasure in most activities, and feelings of worthlessness or guilt. *Id.* at 160-61.

⁴⁸ *Id.* at 645. An individual diagnosed with antisocial personality disorder, for example, exhibits a pervasive pattern of “disregard for, and violation of, the rights of others.” *Id.* at 659.

⁴⁹ That said, individuals can experience symptoms of multiple mental illnesses at once. For example, about twenty-five percent of individuals diagnosed with schizophrenia also meet the criteria for depression. See Samuel G. Siris, *Depression in Schizophrenia: Perspective in the Era of “Atypical” Antipsychotic Agents*, 157 AM. J. PSYCHIATRY 1379, 1380 (2000). But simply because this is true does not negate the problem of causal pathways. We still do not know whether it was the psychotic symptoms of schizophrenia, or the emotional symptoms of depression, or neither, or both in tandem, that caused the given violent act.

⁵⁰ See Knoll & Annas, *supra* note 40, at 90 (“The likelihood of error and oversimplification is substantial when mental illness is considered on ‘the aggregate level’ such that a ‘vast and diverse population of persons diagnosed with psychiatric conditions’ is considered to uniformly represent people who are at risk of committing gun violence against others.” (citing Jonathan M. Metzl & Kenneth T. Macleish, *Mental Illness, Mass Shootings, and the Policies of American Fire-Arms*, 105 AM. J. PUB. HEALTH 240 (2015))); cf. Vars, *supra* note 12, at 1639-42 (arguing that specific symptoms, especially psychotic symptoms, were more closely aligned with violence than a diagnosis of mental illness; “it appears that not every diagnosis carries an increased risk of violence”).

afflictions and active shooters, about the same number of active shooters (twenty-four percent) had a military background.⁵¹ A much higher percentage were male (ninety-four percent) and white (sixty-three percent).⁵²

The FBI has therefore concluded that a diagnosis of mental illness did not have much predictive value in attempting to determine who will become an active shooter.⁵³ As the researchers wrote in their report, “[F]ormally diagnosed mental illness is not a very specific predictor of violence of any type, let alone targeted violence.”⁵⁴

One study of a different set of individuals, thirty-four adolescents who committed mass murders between 1958 and 1999,⁵⁵ produced results that mirrored the patterns found by the FBI. Researchers found that a similar proportion, twenty-three percent of the murderers, had a psychiatric treatment history,⁵⁶ and only two of the perpetrators were psychotic at the time of the murders.⁵⁷

But some analyses have looked beyond diagnosed mental illness to symptoms of mental illness—diagnosed or not—and here the picture becomes somewhat more complicated. For example, a Mother Jones examination of mass shootings furthers the narrative of mass shootings as an outgrowth of a mental health condition.⁵⁸ Of 110 mass shootings counted as of the writing of this Article, the perpetrators of fifty-nine, just over half, had “prior signs of mental health issues.”⁵⁹

But a look at what, specifically, these signs of a mental health condition were raises more questions than it answers. Some of the entries classified individuals as showing signs of a mental health condition based on vague statements from third parties. For example, a cousin said Douglas Williams, who killed six people at his Lockheed Martin workplace before committing suicide, “was depressed and ‘going through a lot of things.’”⁶⁰ Neighbors said Terry Michael Ratzmann,

⁵¹ FED. BUREAU OF INVESTIGATION, A STUDY OF THE PRE-ATTACK BEHAVIORS OF ACTIVE SHOOTERS, *supra* note 41, at 11.

⁵² *Id.* at 10.

⁵³ *Id.* at 17.

⁵⁴ *Id.*

⁵⁵ John Reid Meloy et al., *A Comparative Analysis of North American Adolescent and Adult Mass Murderers*, 22 BEHAV. SCI. & L. 291 (2004).

⁵⁶ *Id.* at 297.

⁵⁷ *Id.*; see also Lisa Aitken et al., *Mass Murders: Implications for Mental Health Professionals*, 38 INT’L J. PSYCHIATRY MED. 261, 264 (2008) (noting that only six percent of adolescent mass murderers showed signs of psychosis).

⁵⁸ Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Aug. 31, 2019), <https://www.motherjones.com/politics/2012/07/mass-shootings-map/> [<https://perma.cc/R7JZ-JEK5>].

⁵⁹ *Id.* (click on “open-source database documenting mass shootings” to view data).

⁶⁰ *Id.*

who killed six people at his church, “suffered from depression and had a drinking problem.”⁶¹

In other entries in the database, past violent acts qualified as a sign of a mental health condition. Devin Kelley, who shot twenty-six people at a church in Sutherland Springs, Texas, “had a history of domestic violence.”⁶² Jimmy Lam, who shot three of his coworkers, had “a history of domestic, work conflicts.”⁶³ These past violent acts are not necessarily a sign of a mental health condition; classifying them as such is a sign that the authors were not particularly careful in who they placed in the mental health condition box.

A different study honed in on psychotic symptoms and did find some links between that type of mental illness and mass violence.⁶⁴ Researchers assessed thirty adult mass murderers⁶⁵ and found that sixty-seven percent were either diagnosed with a psychotic disorder or exhibited behaviors associated with psychosis.⁶⁶

To be sure, there is a subset of the ranks of mass shooters who do exhibit psychotic symptoms. Jared Loughner, who murdered six people in a parking lot during a meet-and-greet with Congresswoman Gabrielle Giffords, had displayed psychotic symptoms before the shooting.⁶⁷ He talked to himself, he laughed inappropriately, and was paranoid about the government following him.⁶⁸ James Holmes visited a campus psychiatrist before shooting twelve people in a movie

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Meloy et al., *supra* note 55, at 303-04.

⁶⁵ Researchers limited their sample to single adults who intentionally killed three victims other than themselves in a single incident, using a firearm as a weapon. They excluded multiple murders that fit into another category of homicide, i.e., serial, spree, felony related, gang motivated, or politically motivated. *Id.* at 295; see also Anthony Hempel et al., *Offender and Offense Characteristics of a Nonrandom Sample of Mass Murderers*, 27 J. AM. ACAD. PSYCHIATRY & L. 213, 214 (1999) (employing the same definition).

⁶⁶ Meloy et al., *supra* note 55, at 305.

⁶⁷ See Sarah Gassen & Timothy Williams, *Before Attack, Parents of Gunman Tried to Address Son's Strange Behavior*, N.Y. TIMES (Mar. 27, 2013), <https://www.nytimes.com/2013/03/28/us/documents-2011-tucson-shooting-case-gabrielle-giffords.html> [https://perma.cc/WF3W-WNQE].

⁶⁸ See Benedict Cary, *Red Flags at a College, but Tied Hands*, N.Y. TIMES (Jan. 10, 2011), <https://www.nytimes.com/2011/01/11/us/11mental.html> [https://perma.cc/NCL5-CT8J] (“Sometimes surly, sometimes seemingly unhinged, [Loughner] was unpredictable in a way that made fellow students in a community college class want to leave the room.”); Cindy Carcamo & Michelle Mello, *Reports Detail Jared Loughner's Behavior Before Tucson Shooting*, L.A. TIMES (Mar. 27, 2013), <https://www.latimes.com/nation/la-xpm-2013-mar-27-la-na-ff-jared-loughner-20130328-story.html> [https://perma.cc/PAH5-8DGP] (“In an interview with law enforcement officials, Loughner’s mother, Amy Loughner, said her son had been acting strangely for about a year, often talking or laughing to himself, and was angry with the government, though she did not say why.”).

theater in Aurora, Colorado.⁶⁹ At their last meeting, he made homicidal and paranoid statements; the psychiatrist was concerned that he was sliding into schizophrenia.⁷⁰

The wild swings in percentages of individuals who have diagnosable mental disorders, especially those with psychotic symptoms, may be a function of the small sample sizes when dealing with mass shootings. These are such rare events that small changes in the composition of the sample can lead to massive fluctuations in results.⁷¹

But even accepting the most damning view of these statistics, that two-thirds of mass shooters harbor psychotic symptoms,⁷² the question remains whether it is the psychosis that drives the actions or some other factor. All of these studies are retrospective, non-random, and small. They draw only from the pool of mass shooters and do not have a comparison group.⁷³ As one researcher cautioned, these shortcomings mean that the studies have no predictive value; their findings cannot be generalized to disrupt future mass shootings.⁷⁴

Thus, while psychosis may be *correlated* with mass shootings (and even the correlation has not been definitively proven),⁷⁵ it may not be the *cause* of mass shootings.⁷⁶ Jared Loughner, for example, was known to use drugs around the time of the Tucson shooting;⁷⁷ drug and alcohol abuse are more highly correlated with violence than mental illness and could be the driver behind the

⁶⁹ Matthew Nussbaum et al., *Aurora Theater Shooting Gunman Told Doctor: “You Can’t Kill Everyone,”* DENV. POST (Jun. 16, 2015), <https://www.denverpost.com/2015/06/16/aurora-theater-shooting-gunman-told-doctor-you-cant-kill-everyone/> [https://perma.cc/Z58Z-9CES].

⁷⁰ *Id.*

⁷¹ See Paul Appelbaum, *Public Safety, Mental Disorders, and Guns*, 70 J. AM. MED. ASS’N PSYCHIATRY 565, 565 (2013).

⁷² Meloy et al., *supra* note 55, at 303-5.

⁷³ The problem with this approach is that the researchers select the study group based solely on the dependent variable and do not compare that group to any other group, which means no causal links can be drawn. They do not look to the entirety of the U.S. population to see who turns out to be a mass shooter; they look only to mass shooters to see what characteristics they possess. As a perhaps helpful analogy that illustrates the problems with this approach, a study group comprised only of dead people would show that going to the hospital is a mortality risk. See, e.g., DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH 6-7 (1963) (describing this type of study as having “such a total absence of control as to be of almost no scientific value”).

⁷⁴ Hempel et al., *supra* note 65, at 224.

⁷⁵ See, e.g., FED. BUREAU OF INVESTIGATION, *supra* note 41, at 7, 17 (finding that only three out of sixty-three active shooters (or just under five percent) had been diagnosed with a psychotic disorder).

⁷⁶ *Cf.* Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 173 (2003) (Kennedy, J. concurring in part and dissenting in part) (“Correlation is not causation.”).

⁷⁷ A.G. Sulzberger & Jennifer Medina, *Shooting Suspect Had Been Known to Use Potent, and Legal, Hallucinogen*, N.Y. TIMES, Jan. 17, 2011, at A16.

act.⁷⁸

Researchers have also found that one common thread linking most mass murderers was extreme anger paired with a feeling that others were treating the shooter unfairly.⁷⁹ Shooters felt as if they were entitled to kill others because of the wrongs that had been done to them.⁸⁰ These threads were present regardless of whether the individual had symptoms of psychosis or other mental illness.⁸¹ As one expert on mass shootings noted after the Parkland murders, “Most of these shooters are angry, antisocial individuals you cannot spot in advance.”⁸²

The truth is, these events are so rare that we simply do not know, and likely will never know, their root cause.⁸³ Yet mass shooters are often characterized as mentally ill, regardless of their actual mental health status. This finger-pointing occurs despite the fact that certain traits, such as extreme anger hardened by resentment and entitlement, are stronger predictors of who will turn publicly, randomly violent than a mental illness diagnosis alone.

2. Other Types of Gun Violence

While mass shootings and other sensational events tend to drive gun policy,⁸⁴ they remain extraordinarily rare events.⁸⁵ Gun murders due to angry altercations, domestic violence, and other criminal activity, like robberies or

⁷⁸ See *infra* Section I.B.2.

⁷⁹ See Knoll & Annas, *supra* note 40, at 84 (“Factors common among individuals who commit mass murder include extreme feelings of anger and revenge, the lack of an accomplice (when the perpetrator is an adult), feelings of social alienation, and planning well in advance of the offense.”).

⁸⁰ As stated in *A Comparative Analysis of North American Adolescent and Adult Mass Murderers*, Ubiquitous throughout our data for both the adolescents and the adults is a pathologically narcissistic belief that they had a *right* to kill others, a sense of entitlement that may have been exacerbated by the porcupine quills of paranoia or the suffocating blanket of depression. Such feelings and attitudes, however, still need to be hardened by a shell of callousness to be acted upon.

Meloy et al., *supra* note 55, at 304.

⁸¹ *Id.*; see also James Fox & Monica DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUD. 125, 133 (2013) (finding that mass shooters tend to share some behavioral characteristics, such as resentment, social isolation, and the tendency to externalize blame).

⁸² Benedict Carey, *Opening Mental Hospitals Unlikely to Prevent Mass Shootings, Experts Say*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/health/trump-mental-hospitals-parkland.html> [<https://perma.cc/NCL5-CT8J>].

⁸³ See Jeffrey W. Swanson, *Explaining Rare Acts of Violence: The Limits of Evidence from Population Research*, 62 PSYCHIATRIC SERV. 1369, 1369 (2011) (explaining that “we do not possess the data” to conduct epidemiological studies into the causes of mass shootings).

⁸⁴ See, e.g., Swanson et al., *supra* note 38, at 366 (describing the Newtown shooting as opening “a rare public window of opportunity to enact meaningful reforms to reduce gun violence in America.”).

⁸⁵ See Swanson et al., *supra* note 83, at 1369.

drugs, are far more common.⁸⁶ On average, almost thirty-three people are murdered with a gun every day in the United States.⁸⁷ Let's look at May 19, 2019, the day before I wrote this paragraph, as an example. Early that morning, police found Dorian Brooks dead from a gunshot wound on a city street in Savannah, Georgia.⁸⁸ At around 6 a.m., in Muskegon Heights, Michigan, a husband returned to his home and shot his wife four times, killing her, after they had argued and he had moved out.⁸⁹ Later that day, at a college graduation party in Arlington, Texas, a man shot and killed a sixty-three-year-old fellow party-goer after they got into a fight.⁹⁰ These acts are not the rare-but-sensational mass murder, but the run-of-the-mill killings so common that they are no more than blips on the local news.

When we examine this kind of gun violence, the uncertain links with mental illness dissipate further. Studies in the last three decades have shown that the assumed link between mental illness and violent acts is attenuated at best, and that other factors, such as substance abuse, are more highly correlated with violence.⁹¹

The MacArthur Violence Risk Assessment Study, which analyzed links between violence and mental illness, followed 1136 individuals for one year after their discharge from a psychiatric hospital and compared them to 519 people

⁸⁶ See, e.g., DEBRA L. KARCH ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, SURVEILLANCE FOR VIOLENT DEATHS, NATIONAL VIOLENT DEATH REPORTING SYSTEM, 16 STATES, 2007, at 10 (2010) (finding that, for cases where causes were known, about thirty-three percent of homicides were precipitated by another crime, 37.5% by interpersonal conflict, and 20.4% by intimate-partner violence).

⁸⁷ EUGENIO WEIGEND VARGAS, CENTER FOR AMERICAN PROGRESS, GUN VIOLENCE IN AMERICA: A STATE-BY-STATE ANALYSIS (2019), <https://www.americanprogress.org/issues/guns-crime/news/2019/11/20/477218/gun-violence-america-state-state-analysis/>.

⁸⁸ *Police Investigate After Gunshot Victim Found in Downtown Savannah*, WTOC (May 19, 2019), <https://www.wtoc.com/2019/05/19/savannah-police-investigate-after-gunshot-victim-found-downtown-savannah/> [<https://perma.cc/TP4D-AHFT>].

⁸⁹ *Suspect in Custody Following Fatal Muskegon Heights Shooting*, WZZM13 (May 19, 2019), <https://www.wzzm13.com/article/news/suspect-in-custody-following-fatal-muskegon-heights-shooting/69-c13ce65e-5e32-4be9-a6b1-7a96f7e16ebb> [<https://perma.cc/8D2U-Z7W9>].

⁹⁰ Jake Harris, *1 Dead After Shooting at College Grad Party in Arlington, Police Say*, WFAA8 (May 19, 2019), <https://www.wfaa.com/article/news/local/1-dead-after-shooting-at-college-grad-party-in-arlington-police-say/287-64ec5596-d9f8-4c86-addb-6b00d3511033> [<https://perma.cc/Q2TQ-PQDF>].

⁹¹ See, e.g., Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCHIVES GENERAL PSYCHIATRY 393, 400 (1998) (stating that results from one study site showed that rates of violence were the same among individuals with mental disorders and those without when neither group abused substances: "Substance abuse significantly raised the prevalence of violence in both patient and community samples").

who lived in the same neighborhoods.⁹² Researchers found that individuals with mental illness and no substance abuse disorder were no more likely to be violent than their neighbors.⁹³

This data set is the only study that compared a population with mental illness to their neighbors, thus controlling for environmental effects that may increase violence.⁹⁴ Because these individuals resided in the same places, usually neighborhoods with high levels of poverty, the rates of violence were somewhat elevated above national norms.⁹⁵

Researchers looked at the study population in ten-week increments over the course of a year. In any given ten-week period, somewhere between 4% and 5.7% of the sample population that did not also have substance abuse symptoms committed an act of violence.⁹⁶ The community group reported a 3.3% rate of violence for a ten-week period, a difference that was not statistically significant.⁹⁷

The story shifted when substance abuse symptoms were taken into account. For the sample population, the highest rates of violence were seen in the initial ten-week period after release from the hospital, where twenty-two percent of substance-abusing former patients committed an act of violence.⁹⁸ In the least-violent ten-week period, 6.1% of the same group acted violently.⁹⁹ But the community sample of individuals who exhibited substance abuse symptoms also acted more violently than the community group without such symptoms, with 11.1% committing a violent act in the ten weeks before the researcher interview.¹⁰⁰ The researchers concluded that there was a statistically significant difference between the study sample and the neighborhood sample in the rates of violence among the groups abusing drugs or alcohol in the first ten-week period after release, but not for any of the other time periods.¹⁰¹

⁹² *Id.* at 394-95.

⁹³ *Id.* at 400. The study also found that individuals with both a mental illness and a substance abuse disorder were more likely to be violent than their substance-abusing neighbors, and that individuals with mental illness were more likely to abuse substances than their neighbors. *Id.*

⁹⁴ See Emma E. McGinty & Daniel W. Webster, *Gun Violence and Serious Mental Illness, in GUN VIOLENCE AND MENTAL ILLNESS 8* (Liza H. Gold & Robert I. Simon eds., 2016) (“One interpretation of the MacArthur study’s findings is that these socioeconomic and environmental influences on violence are stronger than the effects of mental illness on violence, in effect overpowering the relationship between serious mental illness and violence observed in the ECA study.”).

⁹⁵ Steadman, *supra* note 91, at 401.

⁹⁶ Steadman, *supra* note 91, at 399 tbl.5. The researchers defined “violence” to mean an act causing injury, including both use of weapons and the threat of using a weapon. *Id.* at 395.

⁹⁷ *Id.* at 399 tbl.5.

⁹⁸ *Id.* at 399.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Thus, without substance abuse symptoms, psychiatric patients were no more likely to be violent than their neighbors. With substance abuse symptoms, violence rates skyrocketed both among both psychiatric patients and their neighbors. The authors concluded that “discharged mental patients” were not a homogeneous population and rates of violence varied considerably between those who abused substances and those who did not.¹⁰²

Later analysis of the group of patients who acted violently found that most of these acts did not involve use of a gun, and that those individuals who did use a gun were much more likely to have prior arrests or substance abuse problems than the rest of the discharged patient study group.¹⁰³ Only two percent of the former patients used a gun in a violent act.¹⁰⁴ Of that small group, only two of the patients had not been previously arrested, an arrest rate twice as high as the overall patient sample.¹⁰⁵ Almost all of the discharged patients who committed gun violence had been admitted to the hospital with either an alcohol (seventy-four percent) or drug abuse (fifty-two percent) diagnosis; these rates are again over twice as high as the overall discharged patient group.¹⁰⁶

Other studies using the MacArthur data set examined whether certain characteristics among the study population raised the risk of violent acts: one analyzed access to firearms and another looked at specific mental health symptoms.¹⁰⁷ In the first study, researchers found that while having access to a firearm increased the risk of violence both among former patients and among community members, the former patients with firearms access were no more likely to use those guns violently than others in the community with the same access.¹⁰⁸ But while patient status had no effect on rates of violence, drug abuse was highly correlated with an increased risk.¹⁰⁹ The authors concluded that gun violence among those with mental illness is extraordinarily rare outside of the risk factors that predict violence among the general population.¹¹⁰

The second study analyzed whether delusions were positively associated with violent acts.¹¹¹ It found that people in the study group who lived with

¹⁰² *Id.* at 393.

¹⁰³ Henry J. Steadman et al., *Gun Violence and Victimization of Strangers by Persons with a Mental Illness: Data from the MacArthur Violence Risk Assessment Study*, 66 *PSYCHIATRIC SERV.* 1238, 1239-40 (2015).

¹⁰⁴ *Id.* at 1239.

¹⁰⁵ *Id.* at 1239-40.

¹⁰⁶ *Id.*

¹⁰⁷ Paul S. Appelbaum et al., *Violence and Delusions: Data from the MacArthur Violence Risk Assessment Study*, 157 *AM. J. PSYCHIATRY* 566, 568 (2000); Baumann & Teasdale, *supra* note 25, at 46.

¹⁰⁸ Baumann & Teasdale, *supra* note 25, at 48.

¹⁰⁹ *Id.* at 47-48.

¹¹⁰ *Id.* at 48.

¹¹¹ Appelbaum et al., *supra* note 107, at 566.

delusions were no more likely to be violent than nondelusional people.¹¹² With some types of delusions—such as a belief that your body or mind was being controlled by someone else—the rates of violence were actually lower than for others.¹¹³ The study instead found that, for both delusional and nondelusional subjects, imagined violence—thinking about hurting other people—was associated with an uptick in actual violence.¹¹⁴

This research debunks many assumptions about links between mental illness and violence: that delusional thoughts prompt violent behavior, that individuals with mental illness would use weapons violently if given access to them, and that individuals with mental illness are more violent than others in the same neighborhoods. The MacArthur studies raise serious questions as to whether any of these things are true.

Earlier studies using different methodologies did find more of a link between mental illness and violence, confusing the picture somewhat.¹¹⁵ The differences between these results and the MacArthur results could be entirely accounted for by differences in methodology, such as the different definitions of violence or different methods of populating the subject groups.¹¹⁶ But even putting aside these differences, pre-MacArthur studies showed mental illness was only weakly correlated with violence and was not the driver of the vast majority of violence in the United States.

In one of the largest of these studies, the Epidemiologic Catchment Area (ECA) study, researchers assessed the prevalence of mental disorders and violence among residents of three American cities.¹¹⁷ Unlike the MacArthur study, the researchers did not rely solely on individuals who had previously been hospitalized; they assessed symptoms of mental illness among the over 18,000 respondents, drawn mainly from community households but also from prisons, nursing homes, and psychiatric facilities.¹¹⁸ They also did not compare these populations to others in the same neighborhoods, but to those living in the

¹¹² *Id.*

¹¹³ *Id.* at 568.

¹¹⁴ *Id.* at 569.

¹¹⁵ See generally Emma E. McGinty & Daniel W. Webster, *Gun Violence and Serious Mental Illness*, in GUN VIOLENCE AND MENTAL ILLNESS 6-9 (2016) (surveying studies of “the prevalence of violence among the population with mental illness”).

¹¹⁶ See Appelbaum et al., *supra* note 107, at 570-71. One example of the differences in methodology: past studies had shown a small but significant relationship between delusions and violence. These researchers had assessed delusional symptoms based on screening questions; interviewers in the MacArthur study were instructed to probe further and assess whether the subject was actually experiencing delusions, resulting in a smaller pool of subjects classified as delusional. *Id.*

¹¹⁷ Jeffrey W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 HOSP. & COMMUNITY PSYCHIATRY 761, 762 (1990).

¹¹⁸ *Id.*

sampled metropolitan areas.¹¹⁹

Researchers found a weak but statistically significant link between some serious mental illnesses and violence. For example, around seven percent of individuals suffering from schizophrenia, bipolar disorder, or major depression had committed a violent act in the past year, as compared to two percent of individuals without a mental illness or substance abuse disorder.¹²⁰

As with the MacArthur study, abuse of substances led to a dramatic rise in violent behavior. Over twenty-one percent of individuals with a substance abuse disorder had committed an act of violence in the previous year.¹²¹

A few caveats to this finding that are relevant to the purposes of this Article: First, the data did not differentiate between the severity of different violent acts. A person who threw a plate at his wife or was in a physical fight while drinking without landing a punch was counted as “violent,” the same as a subject who committed multiple murders.¹²² The statistic does not mean that seven percent of individuals with serious mental illness shot or even physically harmed another person.

Second, researchers also found that youth, male gender, and low socioeconomic status all were linked to violent acts.¹²³ These factors were correlated with higher rates of violence, regardless of whether the individual was mentally ill.¹²⁴ Later studies supported the hypothesis that social and economic factors, such as poverty, crime victimization, involvement with drugs and drug markets, early life trauma, and neighborhood crime, may largely account for the small links found between mental illness and violence.¹²⁵

Regardless, given the small portion of the population that suffers from serious mental illness, researchers estimated that only four percent of violent crime in the United States was driven by mental illness alone.¹²⁶ Or, put another way, even if the government could somehow detain every person whose violent acts were caused by mental illness before they acted, ninety-six percent of violent acts would still occur.¹²⁷ And this number included *all* violent acts, not only violent acts with a gun. The narrative that the gun violence problem is mainly a

¹¹⁹ *Id.*

¹²⁰ *Id.* at 769.

¹²¹ *Id.* at 766.

¹²² *Id.* at 763.

¹²³ *Id.* at 764.

¹²⁴ *Id.* at 769.

¹²⁵ Swanson et al., *supra* note 38, at 368-69.

¹²⁶ *Id.* at 368.

¹²⁷ *Id.*; see also John S. Rozel & Edward P. Mulvey, *The Link Between Mental Illness and Firearm Violence: Implications for Social Policy and Clinical Practice*, 13 ANN. REV. CLINICAL PSYCHOL. 445, 448 (2017) (“[E]ven if all of the association between mental illness and violence could somehow be eliminated, we would still have to confront 96% of the violence in the United States.”).

mental illness problem is not supported by these results.¹²⁸

Given the weak, at best, links between mental illness and violence, a diagnosis of mental illness tells us little about a person’s capacity to pick up a gun and shoot another. Moreover, the relatively small number of people who have serious mental illness—at least as compared with individuals with alcohol or drug abuse problems—means that even if there was some predisposition to violence, they pose a relatively small risk overall.¹²⁹ But, as illustrated below, mental illness gun bans do little to capture the tiny subset of individuals with mental illness who do pose a risk, and other factors, like substance abuse or violent history, would better identify “dangerous” individuals among this group.

II. THE LEGAL LANDSCAPE

The folly in mental illness gun bans is the assumption that keeping guns out of the hands of individuals with mental illness who have come to the attention of courts or medical professionals will meaningfully reduce gun violence. It assumes we can point to those who have been found incompetent or involuntarily committed to psychiatric hospitals and say, “Them. They are the problem. The rest of us can be trusted with our guns.”

But the psychiatric literature provides little to no support for these assumptions. These laws therefore fail at their goal of preventing guns from getting into the hands of dangerous people because they define the prohibited group in ways that both include many individuals who will never be violent and exclude many individuals who pose a risk.

A. Federal Law

The federal mental illness gun ban has two pathways to prohibition. First, one can be adjudicated “a mental defective.”¹³⁰ I will set aside for the moment the offensiveness of the term “mental defective”¹³¹ to focus on the substance

¹²⁸ See Baumann & Teasdale, *supra* note 25, at 44 (“[T]here is little evidence to suggest that mental illness contributes to >3–5% of all violent crime, and there is even less evidence to suggest that mental illness is a primary cause of gun-involved crime, including homicide”).

¹²⁹ Swanson, *supra* note 117, at 769.

¹³⁰ 18 U.S.C. § 922(g)(4) (2018) (“It shall be unlawful for any person ... who has been adjudicated as a mental defective or who has been committed to a mental institution ... to possess ... any firearm”).

¹³¹ See generally *Seen as Offensive, “Defective” Label for the Mentally Ill Lives on in the Federal Code*, FEDLINE (Jan. 5, 2014), <http://fedline.federaltimes.com/2014/01/05/seen-as-outdated-and-offensive-label-for-the-mentally-ill-lives-on-in-the-federal-code/> [https://perma.cc/7MQB-M2ZV] (noting the continued existence of the term “defective” in the United States Code despite its offensive nature). Contrast this approach with the Supreme Court’s refusal to continue using the term “mental retardation.” See *Hall v. Florida*, 572 U.S. 701, 704 (2014) (using the term “intellectual disability” instead of the term “mental retardation”).

of these restrictions. Second, one can be committed to a mental institution.¹³²

1. Adjudicated as Mental Defective

Under federal law, one is “adjudicated as a mental defective” when a court has found either that he “lacks the mental capacity to contract or manage his own affairs” or “is a danger to himself or others.”¹³³ It includes “a finding of insanity by a court in a criminal case” and those “found incompetent to stand trial or found not guilty by reason of lack of mental responsibility” under the Uniform Code of Military Justice.¹³⁴

The first barrier to entry here is “adjudicated.” To fit within this definition, individuals must have come into contact with a court system or other adjudicative body in some way.¹³⁵ This requirement excludes the vast majority of individuals who go on to commit mass shootings, many of whom had no contact with the mental health or judicial systems before their attack.¹³⁶ Both James Holmes and Jared Loughner showed clear symptoms of mental illness before their shootings, but had not been adjudicated as such.¹³⁷

Just as problematically, the individuals the statute does capture are often not the ones most likely to act violently. To be adjudicated incompetent to stand trial, for example, one must be unable to understand the proceedings or communicate with her attorney.¹³⁸ Not every defendant who suffers from mental illness will meet these criteria.¹³⁹ In fact, only a small proportion of defendants who show signs of mental illness are found incompetent each year.¹⁴⁰

¹³² 18 U.S.C. § 922(g)(4) (2018).

¹³³ 27 C.F.R. § 478.11 (2019).

¹³⁴ *Id.*

¹³⁵ *See* Franklin v. Sessions, 291 F. Supp. 3d 705, 714-5 (W.D. Pa. 2017) (noting that the “plain meaning of ‘adjudicated’ connotes the involvement of a judicial decision-maker, the resolution of a dispute after consideration of argument by the parties involved, and a deliberative proceeding with some form of due process”).

¹³⁶ *See* Vars, *supra* note 12, at 1639 (“The most fundamental shortcoming of diagnosis and treatment-based restrictions is that they require a diagnosis or treatment. Millions of people with mental illness are not diagnosed and do not receive treatment.”).

¹³⁷ *See supra* notes 67-70 and accompanying text (describing how both Holmes and Loughner showed signs of mental illness prior to their shootings).

¹³⁸ *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (“[T]he ‘test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.’”).

¹³⁹ *See, e.g.,* Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1218 (2006) (characterizing the competence standard as a “low baseline, focusing on the bare essentials of the defendant’s involvement at trial”).

¹⁴⁰ *See, e.g.,* Susan McMahon, *Reforming Competence Restoration Statutes: An Outpatient Model*, 107 GEO. L.J. 601, 607 (2019) (stating that 10,000–12,000 defendants are found incompetent

And there is no inherent relationship between incompetence and dangerousness. To be incompetent usually means to be seriously mentally ill, and, as demonstrated above, serious mental illness is not associated with violence in any meaningful way.¹⁴¹

Even if a future mass shooter did find themselves before a judge at some point, not every adjudication results in a finding that an individual is a “mental defective.”¹⁴² Eric Harris and Dylan Klebold, for example, had been arrested for stealing electronics out of a car before they killed thirteen people at Columbine High School.¹⁴³ Neither was found incompetent or insane.¹⁴⁴ Far from it. They were instead referred to a diversion program that kept young, promising, first-time offenders out of the legal system.¹⁴⁵

But if a person living with mental illness does come within the ambits of the court system, he can be adjudicated a mental defective in two ways. First, one is a mental defective if he “lacks the capacity to contract or manage his own affairs.”¹⁴⁶ The few cases to have addressed the meaning of this language have used it to signify the court appointment of a guardian to provide for the individual’s needs.¹⁴⁷ There is no indication that appointment of a guardian is correlated with violence; it is only correlated with severe mental illness, which is not itself an indicator of danger.¹⁴⁸ This criterion is overinclusive to the point of

annually, while 50,000–60,000 defendants are referred for competency assessments annually) (citing CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW: RESEARCH AND PRACTICE* 105 (2015)).

¹⁴¹ See Lauren Kois et al., *Competency to Stand Trial Among Female Inpatients*, 37 *LAW & HUM. BEHAV.* 231, 232, 235 (2012) (noting that “defendants with a psychotic disorder, relative to a nonpsychotic disorder, were eight times more likely to be opined incompetent” and, among female inpatients, defendants with psychotic symptoms were 29 times more likely to be found incompetent); see also Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 81, 84 (2005) (noting that “common symptoms of mental illness associated with findings of incompetence and leading to hospitalization include delusions (i.e., false, fixed beliefs), disorganized thoughts, and agitation”). Moreover, individuals found incompetent have not been convicted of any crime and may, in fact, be factually innocent of the accusations.

¹⁴² See, e.g., *State v. Buchanan*, 924 A.2d 422, 424 (N.H. 2007) (finding that even a criminal defendant found incompetent to stand trial may not qualify as “adjudicated as a mental defective” because incompetence does not equate with either dangerousness or lacking mental capacity to contract or manage his own affairs).

¹⁴³ DAVE CULLEN, *COLUMBINE* 202 (2009).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 214, 217.

¹⁴⁶ 27 C.F.R. § 478.11 (2019).

¹⁴⁷ See *Petramala v. U.S. Dep’t of Justice*, No. CV-10-2002-PHX-FJM, 2011 WL 3880826, at *1 (D. Ariz. Sept. 2, 2011) (“[T]he court found that plaintiff ‘is an incapacitated person as defined by statute and that the appointment of a guardian and conservator is necessary to provide for his demonstrated needs.’”).

¹⁴⁸ See *id.* at *2 (noting that a finding that the defendant is a danger to himself or others is not necessary to classify the defendant as mentally defective).

irrelevance.

“A danger to himself or others,” the second possible means of being adjudicated as a “mental defective,” is more closely aligned with the goals of violence prevention, but not by much. There are three problems with this criterion. First, mental health professionals, on whose opinions judges rely when making these decisions, are notoriously terrible at predicting danger and often overestimate an individual’s future risk.¹⁴⁹ One review of the literature found three central facts to be true: (1) mental health practitioners “inaccurately make future violence predictions,” (2) they “lack training in making violence predictions,” and (3) their dangerousness predictions “are biased by their reliance on a number of cognitive heuristics, which causes them to overestimate rates of future violence.”¹⁵⁰

Second, even without the uncertainty introduced by the experts, dangerousness is a pliable concept that can vary considerably among jurists. The term is elastic and poorly defined, leaving much room for both bias and misapplication.¹⁵¹ As one judge noted, his decisions on whether an individual posed a threat of harm “were inevitably based upon my personal values and standards.”¹⁵²

Third, statutes defining “danger to self or others” often include indicators well beyond a risk of future violence or suicide. In some states, a lack of nourishment or self-care, or unwillingness to seek medical care, qualifies as a

¹⁴⁹ McMahon, *supra* note 140, at 635; *see, e.g.*, JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 77 (1981) (finding that when psychiatrists and psychologists predict violent behavior three times, they are only correct for one of those three predictions).

¹⁵⁰ Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL. PUB. POL’Y & L. 267, 280-81 (2001); *see also* Heller v. Doe, 509 U.S. 312, 324 (1993) (“[M]any psychiatric predictions of future violent behavior by the mentally ill are inaccurate.”). *But see* Edward P. Mulvey, *Assessing the Likelihood of Future Violence in Individuals with Mental Illness: Current Knowledge and Future Issues*, 13 J.L. & POL’Y 629, 632 (2005) (“[C]linicians indeed demonstrate some appreciable accuracy in assessing the likelihood of future violence in individuals with mental illness. However, this does not mean that clinicians are infallible or even that their conclusions are highly accurate in most situations. Rather, it only means that clinical judgments add a moderate amount of valid information to other factors known about the case.”); Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 283, 291 (2006) (noting that success rates can only be fairly assessed by comparing the likelihood of accurate prediction to chance, and that a fifty percent accuracy rate could be far more accurate than a random assignment).

¹⁵¹ *See, e.g.*, MICHAEL PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 2A-4.2, cmt. (2d ed. 1998) (dangerousness remains “misunderstood, and poorly defined and conceptualized”).

¹⁵² William M. Brooks, *The Tail Still Wags the Dog: The Pervasive and Inappropriate Influence by the Psychiatric Profession on the Civil Commitment Process*, 86 N.D. L. REV. 259, 295 (2010) (quoting *Judge Sees Lack of Guidelines for Committing Mental Patients*, N.Y. L.J., Nov. 27, 1987, at 1).

danger to self.¹⁵³ Some states go so far as to include the prospect of deteriorating

¹⁵³ See KAN. STAT. ANN. § 59-2946(f)(3) (West, Westlaw through laws effective on or before July 1, 2019, enacted during 2019 Reg. Sess.) (defining “likely to cause harm to self or others” as including “substantially unable . . . to provide for any of the person’s basic needs”); KY. REV. STAT. ANN. § 202A.011(2) (West, Westlaw through 2019 Reg. Sess. and 2019 1st Extraordinary Sess.) (defining “danger” to include “actions which deprive self, family, or others of the basic means of survival, including provision for reasonable shelter, food and clothing”); MASS. GEN. LAWS ANN. ch. 123, § 1 (West, Westlaw through ch. 88 of 2019 1st Ann. Sess.) (defining “likelihood of serious harm” to include “a very substantial risk of physical impairment or injury to the person himself as manifested by evidence the person’s judgment is so affected that he is unable to protect himself in the community”); MISS. CODE ANN. §§ 41-21-73(4), 41-21-61(f) (West, Westlaw through 2019 Reg. Sess.) (defining “substantial likelihood of physical harm” to include “a failure to provide necessary food, clothing, shelter, or medical care for himself”); MO. ANN. STAT. §§ 632.350(5), 632.005(10) (West, Westlaw through 2019 1st Reg. and 1st Extraordinary Sess. of the 100th Gen. Assembly) (defining “likelihood of serious harm” to include “inability to provide for his basic necessities of food, clothing, shelter, safety, or medical or mental health care”); NEB. REV. STAT. §§ 71-925(1), 71-908 (West, Westlaw through 1st Reg. Sess. of 106th Legislature (2019)) (defining “substantial risk of serious harm” to include “evidence of inability to provide for his or her basic human needs, including food, clothing, shelter, essential medical care, or personal safety”); NEV. REV. STAT. ANN. §§ 433A.310(1), 433A.115(2) (LexisNexis, Lexis through 80th Reg. Sess., including all legislation effective May 28, 2019 or earlier) (defining “clear and present danger of harm” to include “[inability] to satisfy his or her need for nourishment, personal or medical care, shelter, self-protection, or safety”); N.H. REV. STAT. ANN. §§ 135-C:34, 135-C:27(1) (Westlaw through ch. 346 of the 2019 Reg. Sess.) (defining “danger to himself” as including “lack [of] capacity to care for his own welfare [such] that there is a likelihood of death, serious bodily injury, or serious debilitation”); N.J. STAT. ANN. §§ 30:4-27.2(m), 30:4-27.2(h) (West, Westlaw through L. 2019, c. 267 and J.R. No. 22) (defining “dangerous to self” to include behaviors that indicate “the person is unable to satisfy his need for nourishment, essential medical care or shelter”); N.M. STAT. ANN. §§ 43-1-11(E), 43-1-3(M) (West, Westlaw through 1st Reg. Sess. of the 54th Legislature (2019)) (defining “likelihood of serious harm to oneself” to include “grave passive neglect”); N.C. GEN. STAT. ANN. §§ 122C-268(j), 122C-3(11) (West, Westlaw through S.L. 2019-238 of the Reg. Sess. of the Gen. Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes) (defining “dangerous to self” to mean that the individual would be unable to “exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy the individual’s need for nourishment, personal or medical care, shelter, or self-protection and safety”); N.D. CENT. CODE ANN. §§ 25-03.1-07, 25-03.1-02(14), (21) (West, Westlaw through legislation effective through Jan. 1, 2020, from the 66th Gen. Assembly) (defining “serious risk of harm” to mean “substantial deterioration in physical health, or substantial injury, disease, or death, based upon recent poor self-control or judgment in providing one’s shelter, nutrition, or personal care”); 50 PA. STAT. AND CONS. STAT. ANN. §§ 7304(a), 7301(b) (West, Westlaw through 2019 Reg. Sess. Act 87) (defining “clear and present danger” to mean that person is “unable . . . to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety”); S.D. CODIFIED LAWS §§ 27A-1-2, 27A-1-1(7) (Westlaw through 2019 Sess. Laws, Exec. Order 19-1 and Sup. Ct. Rule 19-18) (defining “danger to self” to include “an inability to provide for some basic human needs such as food, clothing, shelter, essential medical care, or personal safety, or by arrests for criminal behavior”); UTAH CODE ANN. §§ 62A-15-631(16), 62A-15-602(18) (West, Westlaw through 2019 1st Spec. Sess.) (defining “substantial danger” to include the incapability “of providing the basic

mental health as a danger to oneself.¹⁵⁴ In these jurisdictions, violence need not be on the horizon for one to be labeled dangerous.

2. Committed to a Mental Institution

The second path to disqualification, “committed to a mental institution,” is in most ways co-extensive with “adjudicated as a mental defective.” This is in large part because many jurisdictions require either a judicial or quasi-judicial commitment proceeding and exclude individuals who were hospitalized on a temporary or emergency basis from the definition.¹⁵⁵ A defendant who is committed to a mental institution by a court because he poses a danger to himself or others, one criterion for commitment in nearly every state,¹⁵⁶ qualifies

necessities of life, including food, clothing, and shelter”); VT. STAT. ANN. tit. 18, §§ 7611, 7101(17) (West, Westlaw through Acts of Reg. Sess. of the 2019-2020 Vt. Gen. Assembly (2019)) (defining “danger of harm to himself or herself” as including inability “to satisfy his or her need for nourishment, personal or medical care, shelter, or self-protection and safety”); W. VA. CODE ANN. §§ 27-5-4(k), 27-1-12(a)(5) (West, Westlaw through 2019 Reg. Sess. with law of the 2019 1st Extraordinary Sess. approved through Aug. 7, 2019) (defining “likely to cause serious harm” as including inability “to satisfy his or her need for nourishment, medical care, shelter or self-protection and safety”); WIS. STAT. ANN. §§ 51.20(1)(a)(1), 51.20(1)(a)(2) (West, Westlaw through 2019 Act 5, published May 4, 2019) (defining “dangerous” as including an inability “to satisfy basic needs for nourishment, medical care, shelter or safety”); WYO. STAT. ANN. §§ 25-10-110(j), 25-10-101(a)(ii) (West, Westlaw through 2019 Gen. Sess. of Wyo. Legislature) (defining “dangerous to himself or others” to include an inability “to satisfy basic needs for nourishment, essential medical care, shelter or safety”).

¹⁵⁴ See, e.g., N.D. CENT. CODE. §§ 25-03.1-07, 25-03.1-02(14), (21).

¹⁵⁵ See *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 681-82 (6th Cir. 2016) (en banc) (stating that § 922(g)(4) “applies only to persons who are *involuntarily* committed by an appropriate judicial authority following due process safeguards”); *United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012) (“[A] temporary hospitalization under section 3863 does not constitute a ‘commitment’ under section 922”); *United States v. Giardina*, 861 F.2d 1334, 1337 (5th Cir. 1988) (holding that there is nothing in § 922(g) which indicates an intent to prohibit the possession of firearms by persons who had been hospitalized for observation and examination where they were found not to be mentally ill and were not committed); *United States v. Hansel*, 474 F.2d 1120, 1122-23 (8th Cir. 1973) (same).

¹⁵⁶ ALASKA STAT. ANN. § 47.30.755(a) (West, Westlaw through Nov. 27, 2019 of the 2019 1st Reg. Sess. And the 2019 1st Spec. Sess. of the 31st Legislature); ARIZ. REV. STAT. ANN. § 36-540(A) (Westlaw through 1st Reg. Sess. of the 54th Legislature (2019)); CAL. WELF. & INST. CODE § 5250 (West, Westlaw through ch. 870 of the 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 27-65-109(4) (West, Westlaw through the 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 17a-498(c) (West, Westlaw through 2019 Jan. Reg. Sess. and the 2019 July Spec. Sess.); FLA. STAT. ANN. § 394.467(1) (West, Westlaw through 2019 1st Reg. Sess. of the 26th Legislature); GA. CODE ANN. § 37-3-1(9.1) (West, Westlaw through acts passed during the 2019 Sess. of the Gen. Assembly); HAW. REV. STAT. ANN. § 334-60.2 (West, Westlaw through Act 286 of the 2019 Reg. Sess., pending text revision by the revisor of statutes); IDAHO CODE § 66-329(11) (West, Westlaw through 2019 1st Reg. Sess. of the 65th Idaho Legislature, which adjourned sine die on Apr. 11, 2019); 405 ILL. COMP. STAT. ANN. 5/1-119 (West, Westlaw through P.A. 101-592); IND. CODE ANN. § 12-26-6-8(a) (West, Westlaw through 2019 1st Reg. Sess. of the 121st Gen.

both under this prong of the definition and as being adjudicated as a “mental defective.” The under- and over-inclusiveness problems identified with this definition also apply here.

But the “committed to a mental institution” definition also often captures a person who may be committed because he is “gravely disabled.”¹⁵⁷ Depending

Assembly); IOWA CODE ANN. § 229.1(20) (West, Westlaw through 2019 Reg. Sess., subject to changes made by Iowa Code Editor for Code 2020); KAN. STAT. ANN. § 59-2946(f) (West, Westlaw through laws effective on or before July 1, 2019, enacted during the 2019 Reg. Sess. of the Kan. Legislature); KY. REV. STAT. ANN. § 202A.026 (West, Westlaw through 2019 Reg. Sess. and 2019 1st Reg. Sess.); LA. REV. STAT. ANN. § 28:55(E)(1) (West, Westlaw through 2019 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 123, § 1 (West, Westlaw through ch. 88 of 2019 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 330.1401.(1) (West, Westlaw through P.A.2019, No. 131, of the 2019 Reg. Sess., 100th Legislature); MISS. CODE ANN. §§ 41-21-73(4), 41-21-61(f) (West, Westlaw through 2019 Reg. Sess.); MO. ANN. STAT. §§ 632.350(5), 632.005(10) (West, Westlaw through 2019 1st Reg. and 1st Extraordinary Sess. of the 100th Gen. Assembly); MONT. CODE ANN. § 53-21-126(1) (West, Westlaw through 2019 Sess.); NEB. REV. STAT. ANN. §§ 71-925(1), 71-908 (West, Westlaw through 1st Reg. Sess. of the 106th Legislature (2019)); NEV. REV. STAT. §§ 433A.310(1), 433A.115(2) (LexisNexis, Lexis through 80th Reg. Sess., including all legislation effective May 28, 2019 or earlier); N.H. REV. STAT. ANN. §§ 135-C:34, 135-C:27(1) (Westlaw through ch. 346 of the 2019 Reg. Sess.); N.J. STAT. ANN. §§ 30:4-27.2(m), 30:4-27.2(h) (West, Westlaw through L. 2019, c. 267 and J.R. No. 22); N.M. STAT. ANN. §§ 43-1-11(E), 43-1-3(M) (West, Westlaw through 1st Reg. Sess. of the 54th Legislature (2019)); N.C. GEN. STAT. ANN. §§ 122C-268(j), 122C-3(11) (West, Westlaw through S.L. 2019-238 of the Reg. Sess. of the Gen. Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes); N.D. CENT. CODE ANN. §§ 25-03.1-07, 25-03.1-02(14), (21) (West, Westlaw through legislation effective through Jan. 1, 2020, from the 66th Gen. Assembly); OHIO REV. CODE ANN. §§ 5122.15(C), 5122.01(B) (West, Westlaw through Files 1 to 18 of the 133d Gen. Assembly (2019-2020)); 50 PA. STAT. AND CONS. STAT. ANN. §§ 7304(a), 7301 (West, Westlaw through 2019 Reg. Sess. Act 87); S.C. CODE ANN. § 44-17-580(A) (Westlaw through the 2019 sess., subject to technical revisions by the Code Commissioner as authorized by law before official publication); S.D. CODIFIED LAWS §§ 27A-1-2, 27A-1-1(6)-(7) (Westlaw through 2019 Sess. Laws, Exec. Order 19-1 and Sup. Ct. Rule 19-18); TEX. HEALTH & SAFETY CODE ANN. § 574.034(a) (West, Westlaw through 2019 Reg. Sess. of the 86th Legislature); UTAH CODE ANN. § 62A-15-631(16) (West, Westlaw through 2019 1st Spec. Sess.); VT. STAT. ANN. tit. 18, §§ 7611, 7101(17) (West, Westlaw through Acts of Reg. Sess. of the 2019-2020 Vt. Gen. Assembly (2019)); VA. CODE ANN. § 37.2-817(C) (West, Westlaw through 2019 Reg. Sess.); WASH. REV. CODE ANN. § 71.05.240(3) (West, Westlaw through 2019 Reg. Sess. of the Wash. Legislature); W. VA. CODE ANN. §§ 27-5-4(k), 27-1-12(a) (West, Westlaw through 2019 Reg. Sess. with law of the 2019 1st Extraordinary Sess. approved through Aug. 7, 2019); WIS. STAT. ANN. §§ 51.20(1)(a)(1), 51.20(1)(a)(2) (West, Westlaw through 2019 Act 5, published May 4, 2019); WYO. STAT. ANN. §§ 25-10-110(j), 25-10-101(a)(ii) (West, Westlaw through 2019 Gen. Sess. of Wyo. Legislature).

¹⁵⁷ See Donald H. Stone, *Confine Is Fine: Have the Non-Dangerous Mentally Ill Lost Their Right to Liberty?*, 20 VA. J. SOC. POL'Y & L. 323, 325 (2012) (noting that forty-two states have criteria broader than dangerousness that include either a “grave disability” or “need for treatment”); see also, e.g., ALASKA STAT. ANN. § 47.30.755(a); ARIZ. REV. STAT. ANN. § 36-540(A); CAL. WELF. & INST. CODE § 5250; COLO. REV. STAT. ANN. § 27-65-109(4); CONN. GEN. STAT. ANN. § 17a-498(c); IDAHO CODE ANN. § 66-329(11); IND. CODE ANN. § 12-26-6-8(a); LA. REV. STAT. ANN. § 28:55(E)(1); WASH. REV. CODE ANN. § 71.05.240(3). For examples of these broad criteria,

on the definition adopted by the state, “gravely disabled” can capture a larger swath of people than those deemed dangerous or unable to manage their own affairs.¹⁵⁸ Indiana, for example, defines “gravely disabled” to include any individual who, as a result of mental illness, is in danger of coming to harm because he “has a substantial impairment or obvious deterioration of that individual’s judgment, reasoning, or behavior that results in the individual’s inability to function independently.”¹⁵⁹

The breadth of that definition could include any individual who is in an acute phase of mental illness. Under this standard, one court upheld the commitment of an individual with mental illness who had lived on her own and held steady employment.¹⁶⁰ But she refused medication with lithium and had arrived at the hospital in a manic state.¹⁶¹ The court committed her because “A.R. has a documented history of mental illness and would benefit from the medications prescribed to her, but she has failed or refused to either take the medications or take them in the manner prescribed.”¹⁶²

In some states, “gravely disabled” even includes individuals not currently symptomatic, but who have given some indication that they will not comply with medication in the future. In Alaska, for example, a gravely disabled person is one who will “suffer . . . severe abnormal, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person’s previous ability to function independently.”¹⁶³ This standard included a man who the trial court described as a “very nice person” and who, after treatment, had returned to being a “functioning human being” after being catatonic upon his admission to the hospital.¹⁶⁴ But his doctor testified that he probably would not take his medication in the future; as a result, the court ordered him committed as

see MICH. COMP. LAWS ANN. § 330.1401.(1) (allowing commitment for an individual who “is unable to attend to his or her basic physical needs such as food, clothing, or shelter”); MONT. CODE ANN. § 53-21-126(1) (allowing commitment when the individual “is substantially unable to provide for the respondent’s own basic needs of food, clothing, shelter, health, or safety”); S.C. CODE ANN. § 44-17-580(A) (allowing commitment when the individual “lacks sufficient insight or capacity to make responsible decisions with respect to his treatment”); TEX. HEALTH & SAFETY CODE ANN. § 574.034(a) (allowing commitment when the defendant is experiencing “deterioration” in the ability to “function independently,” exhibited by an inability to provide for “basic needs, including food, clothing, health, or safety,” among other requirements).

¹⁵⁸ See Stone, *supra* note 157, at 325.

¹⁵⁹ IND. CODE ANN. § 12-7-2-96.

¹⁶⁰ Civil Commitment of A.R. v. Clarian Health Partners, Inc., No. 49A05-1011-MH-665, 2011 WL 2472781 (Ind. Ct. App. Jun. 22, 2011).

¹⁶¹ *Id.* at *1.

¹⁶² *Id.* at *3.

¹⁶³ ALASKA STAT. ANN. § 47.30.915(9)(B).

¹⁶⁴ *In re Jeffrey E.*, 281 P.3d 84, 88 (Alaska 2012).

“gravely disabled.”¹⁶⁵

These individuals had no records of violence. They did nothing more than fail to take their prescribed medication or indicate that they may not do so in the future.¹⁶⁶ Yet they, too, are captured by the federal firearms restrictions.

B. Broader Restrictions in Individual States

Several states either track the language of the federal statute or largely capture the same groups of individuals as the federal statute in their firearms possession laws.¹⁶⁷ A few go further and ban a broader spectrum of individuals

¹⁶⁵ *Id.* at 88-89.

¹⁶⁶ See Stone, *supra* note 157, at 325-26 (“The[] [gravely disabled] criteria give judges broad discretion to make civil commitment decisions and overvalue the role of medication adherence in the treatment of mental illness.”).

¹⁶⁷ See ARIZ. REV. STAT. ANN. §§ 13-3101(7), 13-3102(4) (Westlaw through 1st Reg. Sess. of the 54th Legislature (2019)) (prohibiting possession for one who has been found to be a danger to himself or others pursuant to court order; allowing for restoration of firearms possession); ARK. CODE ANN. § 5-73-103(a) (West, Westlaw through 2019 Reg. Sess. of the 92d Ark. Gen. Assembly) (forbidding possession of a firearm for individuals who have been adjudicated mentally ill or involuntarily committed to a mental institution); CAL. WELF. & INST. CODE § 8103 (West, Westlaw through ch. 870 of the 2019 Reg. Sess.) (allowing firearms possession when a person has received a certificate stating person may possess a firearm without endangering others); CONN. GEN. STAT. ANN. § 53a-217c (West, Westlaw through 2019 Jan. Reg. Sess. and the 2019 July Spec. Sess.) (barring individuals who either have been found not guilty due to a mental defect or have been confined in a mental hospital within the proceeding sixty months by order of a probate court); DEL. CODE ANN. tit. 11, § 1448 (West, Westlaw through ch. 219 of the 150th Gen. Assembly (2019-2020)) (barring individuals involuntarily committed, or, for crimes of violence, found not guilty by reason of insanity, or found incompetent to stand trial, but allowing such individuals to petition for relief from the prohibition); FLA. STAT. ANN. §§ 790.064(1), 790.065(2) (West, Westlaw through 2019 1st Reg. Sess. of the 26th Legislature) (barring individuals who have been adjudicated mental defective or committed to a mental institution from possessing a firearm unless relief is obtained); IOWA CODE ANN. § 724.15(1)(c) (West, Westlaw through 2019 Reg. Sess., subject to changes made by Iowa Code Editor for Code 2020) (prohibiting permits for those barred from firearms possession by federal law); KAN. STAT. ANN. § 21-6301(9) (West, Westlaw through laws effective on or before July 1, 2019, enacted during the 2019 Reg. Sess. of the Kan. Legislature) (defining criminal use of weapons to include “selling, giving or otherwise transferring any firearm to any person who is or has been a mentally ill person subject to involuntary commitment”); 15 ME. REV. STAT. § 393 (Westlaw through 2019 1st Reg. Sess. and ch. 531 of 1st Spec. Sess. of the 129th Legislature) (barring ownership, possession, or control when the individual “has been found not criminally responsible by reason of insanity” for certain enumerated crimes); MICH. COMP. LAWS ANN. § 28.422(3)(f)-(h) (West, Westlaw through P.A.2019, No. 131, of the 2019 Reg. Sess., 100th Legislature) (prohibiting issuance of a license to purchase or carry firearms when the person is under an order of involuntary commitment, inpatient or outpatient, or he has been adjudicated legally incapacitated); MINN. STAT. ANN. § 624.713(3), subd. 4 (West, Westlaw through legislation effective through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sess.) (allowing for restoration of ability to possess a firearm); MO. REV. STAT. ANN. § 571.070 (West, Westlaw through 2019 1st Reg. and 1st Extraordinary Sess. of the 100th Gen. Assembly)

with mental illness from owning guns.¹⁶⁸ Hawaii, for example, bars anyone who

(prohibiting firearms possession for those “currently adjudged mentally incompetent”); NEV. REV. STAT. ANN. § 202.360(2) (West, Westlaw through 80th Reg. Sess. (2019)); N.Y. PENAL LAW § 400.00(1) (McKinney, Westlaw through L.2019, ch. 574); N.C. GEN. STAT. ANN. § 14-404(c) (West, Westlaw through S.L. 2019-238 of the Reg. Sess. of the Gen. Assembly, subject to changes made pursuant to the direction of the Revisor of Statutes) (preventing individuals who have been adjudicated mentally incompetent or have been committed to any mental institution from being issued permits to purchase or receive handguns); N.D. CENT. CODE ANN. §§ 62.1-02-01(1), 62.1-02-01.2 (West, Westlaw through legislation effective through Jan. 1, 2020, from the 66th Gen. Assembly) (allowing for petitions for relief from prohibition); OR. REV. STAT. ANN. § 166.250(1) (LexisNexis, Lexis through 2019 Reg. Sess.) (prohibiting possession if individual was committed to Oregon Health Authority or was found to be a person with mental illness and “subject to an order . . . that the person be prohibited from purchasing or possessing firearms as a result of that mental illness”); 18 PA. STAT. AND CONS. STAT. ANN. § 6105(c) (West, Westlaw through 2019 Reg. Sess. Act 87) (prohibiting possession for any person who has been adjudicated as mentally incompetent or involuntarily committed to a mental institution for inpatient treatment); S.C. CODE ANN. § 16-23-30 (Westlaw through the 2019 sess., subject to technical revisions by the Code Commissioner as authorized by law before official publication) (barring sale or transfer of handguns rather than possession, but capturing the same individuals as federal law); *id.* § 44-23-1080 (barring possession of all firearms by individuals under the jurisdiction of the S.C. Department of Mental Health); VA. CODE ANN. §§ 18.2-308.1:2(A), 18.2-308.1:3(A) (West, Westlaw through 2019 Reg. Sess.) (barring individuals who are found to be mentally incompetent or mentally incapacitated, or who have been involuntarily committed to a mental facility, from possessing a firearm); WASH. REV. CODE ANN. § 9.41.040 (West, Westlaw through 2019 Reg. Sess. of the Wash. Legislature) (prohibiting possession by individuals found not guilty by reason of insanity or involuntarily committed, but allowing individuals to petition for relief from the ban); W. VA. CODE ANN. § 61-7-7(a)(4) (West, Westlaw through 2019 Reg. Sess. with law of the 2019 1st Extraordinary Sess. approved through Aug. 7, 2019) (preventing persons who have been adjudicated as mentally incompetent or who have been involuntarily committed to a mental institution from possessing a firearm and requiring immediate surrender of firearms once either circumstance occurs); WIS. STAT. ANN. §§ 941.29(1m), 51.20(13)(cv)1 (West, Westlaw through 2019 Act 5, published May 4, 2019); WYO. STAT. ANN. § 6-8-404(c)-(d) (West, Westlaw through 2019 Gen. Sess. of the Wyo. Legislature) (requiring that, in order to lawfully possess or purchase a firearm, a person must not currently be deemed legally incompetent and not have been committed to a mental institution).

Some other states limit their mental health-related restrictions only to the issuance of permits to carry concealed handguns. *See generally* LA. REV. STAT. ANN. § 40:1379.3 (Westlaw through 2019 Reg. Sess.); NEB. REV. STAT. ANN. § 69-2433 (West, Westlaw through 1st Reg. Sess. of the 106th Legislature (2019)); N.M. STAT. ANN. § 29-19-4 (West, Westlaw through 1st Reg. Sess. of the 54th Legislature (2019)); OHIO REV. CODE ANN. § 2923.125 (West, Westlaw through Files 1 to 18 of the 133d Gen. Assembly (2019-2020)); TENN. CODE ANN. § 39-17-1351 (West, Westlaw through 2019 1st Extraordinary Sess. of the 111th Tenn. Gen. Assembly); TEX. GOV'T CODE ANN. § 411.172 (West, Westlaw through 2019 Reg. Sess. of the 86th Legislature); UTAH CODE ANN. § 53-5-704 (West, Westlaw through 2019 1st Spec. Sess.).

¹⁶⁸ I note below the ways in which these statutes expand upon the federal prohibition. Unless otherwise noted, these statutes also capture those groups prohibited from possessing a firearm by federal law. ALA. CODE 1975 § 13A-11-72(a) (Westlaw through Act 2019-540) (stating that “[n]o person . . . of unsound mind shall own a firearm or have one in his or her possession or under his or her control”); CAL. WELF. & INST. CODE § 8100(a) (West, Westlaw

“[i]s or has been diagnosed as having a significant behavioral, emotional, or mental disorder” from possessing a gun.¹⁶⁹

Only a prohibition this broad could have prevented James Holmes from purchasing guns. But forty-six percent of Americans have been diagnosed with a mental illness at some point in their lives.¹⁷⁰ Hawaii seems to count them all as presumptively dangerous.¹⁷¹

From the perspective of preventing gun violence, the Hawaii approach is closer to the ideal gun restriction, as it bars large portions of the population from having guns. But the problem with the Hawaii statute is that it conditions ownership on a lack of diagnosed mental illness. It does not say to *everyone* that

through ch. 870 of 2019 Reg. Sess.) (barring individuals who have been “admitted to a facility and [are] receiving inpatient treatment” whom the attending health professional believes are a danger to themselves or others); D.C. CODE ANN. § 7-2502.03(a)(6) (West, Westlaw through Nov. 26, 2019) (barring individuals confined to a mental health facility voluntarily or involuntarily within five-year period preceding application); HAW. REV. STAT. ANN. § 134-7(c) (West, Westlaw through Act 286 of 2019 Reg. Sess., pending text revision by the revisor of statutes) (barring possession or control of firearms when the individual “is or has been diagnosed as having significant behavioral, emotional, or mental disorders”); 720 ILL. COMP. STAT. § 5/24-3.1(a) (West, Westlaw through P.A. 101-592) (barring possession by individuals who have been a patient in a mental institution within the past five years); MD. CODE ANN., PUB. SAFETY § 5-133(b) (West, Westlaw through 2019 Reg. Sess. of the Gen. Assembly) (barring individuals who “suffer[] from a mental disorder . . . and [have] a history of violent behavior against the person or another” or have “been voluntarily admitted for more than 30 consecutive days” to a mental health treatment facility); MASS. GEN. LAWS ANN. ch. 140, § 131 (West, Westlaw through ch. 88 of 2019 1st Ann. Sess.) (including individuals who have been “committed to a hospital or institution for mental illness” with or without a court order); MISS. CODE ANN. § 45-9-101(2) (West, Westlaw through 2019 Reg. Sess.) (including individuals who have been either voluntarily or involuntarily committed, but limits restrictions to “stun guns, concealed weapons, or revolvers”); N.J. REV. STAT. ANN. § 2c:58-3(c) (West, Westlaw through L.2019, c. 267 and J.R. No. 22) (prohibiting issuance of firearms purchase license if the individual has “ever been confined for a mental disorder” unless person produces proof that he is no longer incapacitated); OKLA. STAT. ANN. tit. 21, § 1289.12 (West, Westlaw through 1st Reg. Sess. of the 57th Legislature (2019)) (prohibiting sale or transfer of various firearms to “any individual who . . . is mentally or emotionally unbalanced or disturbed”); R.I. GEN. LAWS ANN. § 11-47-6 (West, Westlaw through ch. 310 of 2019 Reg. Sess.) (prohibiting individuals under “treatment” by virtue of being mentally incompetent from possessing firearms).

¹⁶⁹ HAW. REV. STAT. ANN. § 134-7(c)(3).

¹⁷⁰ FED. BUREAU OF INVESTIGATION, A STUDY OF THE PRE-ATTACK BEHAVIORS OF ACTIVE SHOOTERS, *supra* note 41, at 17; *see also* Debra J. Brody et al., NAT’L CTR. FOR HEALTH STATISTICS DATA, PREVALENCE OF DEPRESSION AMONG ADULTS AGED 20 AND OVER: UNITED STATES, 2013–2016 1 (2018), <https://www.cdc.gov/nchs/products/databriefs/db303.htm> [<https://perma.cc/AC4A-6XLH>] (finding that eight percent of Americans suffered from depression in any two-week period between 2013 and 2016).

¹⁷¹ That said, the statute does allow individuals with a past diagnosis to possess a gun when they have been “medically documented to be no longer adversely affected by the . . . mental disease, disorder, or defect.” HAW. REV. STAT. ANN. § 134-7(c).

you cannot have a firearm. It says this only to those who have visited a psychiatrist and received a diagnosis, deeming them de facto dangerous, and thus further cementing the association in the public mind between mental illness and violence.

* * *

To sum up, the mental illness gun bans of the states and the federal government are tied to some concrete indicator of mental illness, be that a court finding, a hospital commitment, or a diagnosis. By focusing on these tangible indicia, these laws are vastly overinclusive and underinclusive. They call the “nice” person who may not take his medication in the future too dangerous to be trusted with firearms,¹⁷² but fail to capture Stephen Paddock,¹⁷³ Omar Mateen,¹⁷⁴ Adam Lanza,¹⁷⁵ Nikolas Cruz,¹⁷⁶ Jared Loughner,¹⁷⁷ James Holmes,¹⁷⁸ or many other mass shooters.¹⁷⁹

A recent study of a law strengthening background checks bears out the conclusion that these laws do little to stem gun violence.¹⁸⁰ Connecticut enacted

¹⁷² See *In re Jeffrey E.*, 281 P.3d 84, 88 (Alaska 2012).

¹⁷³ See *supra* notes 19–24 and accompanying text (showing that most individuals who commit gun violence are not mentally ill).

¹⁷⁴ Adam Goldman, Joby Warrick & Max Bearak, “*He Was Not a Stable Person*”: Orlando Shooter Showed Signs of Emotional Trouble, WASH. POST (Jun. 12, 2016), https://www.washingtonpost.com/world/national-security/ex-wife-of-suspected-orlando-shooter-he-beat-me/2016/06/12/8a1963b4-30b8-11e6-8ff7-7b6c1998b7a0_story.html [<https://perma.cc/8GSL-8PAC>] (“Mateen had a blemish-free record when he applied for a Florida license to carry concealed weapons and again when he legally purchased two firearms . . . just a few days before the shootings.”).

¹⁷⁵ See Alison Leigh Cowan, *Adam Lanza’s Mental Problems ‘Completely Untreated’ Before Newtown Shooting*, N.Y. TIMES (Nov. 21, 2014), <https://www.nytimes.com/2014/11/22/nyregion/before-newtown-shootings-adam-lanzas-mental-problems-completely-untreated-report-says.html> [<https://perma.cc/DR8Q-T359>] (citing a report by medical experts, which found that Lanza’s mother refused medication and other treatments for her son before the shooting and that made no mention of commitments to a mental health facility or adjudications of mental illness).

¹⁷⁶ See Phil McCausland, *Florida Mental Health Agency Examined Cruz in 2016, Didn’t Hospitalize Him*, NBCNEWS.COM (Feb. 19, 2018), <https://www.nbcnews.com/news/us-news/social-media-post-led-florida-agency-investigate-nikolas-cruz-2016-n849221> [<https://perma.cc/C9A3-ZLR9>] (explaining that crisis workers chose not to hospitalize Cruz after being called to perform a psychiatric evaluation on him).

¹⁷⁷ See McCreary, *supra* note 12, at 819 (“Both Loughner and Holmes had previously shown signs of mental illness Both Loughner and Holmes purchased their guns, seemingly legally, from federally licensed firearms dealers.”).

¹⁷⁸ *Id.*

¹⁷⁹ The overwhelming majority of mass shooters obtain their guns legally and pass federal background checks. See Bonnie Berkowitz et al., *The Terrible Numbers that Grow with Each Mass Shooting*, WASH. POST, Dec. 10, 2019 (finding that, of the 239 guns where we know how it was acquired, 181, or seventy-five percent, were obtained legally).

¹⁸⁰ Swanson et al., *supra* note 38, at 373.

legislation to report gun-disqualifying mental health records to the National Instant Criminal Background Check System in 2007.¹⁸¹ Presumably, after this change, individuals who were disqualified under the federal law would be unable to purchase a firearm at the point of sale; this had not been true before this reporting change. But the law made little difference to the violent crime rates. Researchers estimated that violent crime among individuals with serious mental illness was reduced by less than one-half of one percent.¹⁸²

These laws thus do little to solve the problem of gun violence in general or mass shootings in particular, and they only serve to put a legislative stamp of approval on the stereotype of the dangerous “crazed lunatic.”¹⁸³

III. THE DANGEROUSNESS MYTH AND ITS HARMS

The problem with these laws, and with most calls for legislation dealing with “mental health” in the wake of violent events, is that they are based on bias, not reality. They target the anecdotal violent outlier with mental illness while ignoring the many, many violent individuals who have no mental health condition.

That bias is prevalent throughout our society; individuals with mental illness are likely the most stigmatized group of people in the United States today. The bias against them is on par with that held against individuals because of their race, gender, or physical disabilities.¹⁸⁴ Michael Perlin has described this bias as “sanism,” and has shown how it gives birth to several deeply held myths about

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Bacon & Jones, *supra* note 2. While my argument is a normative one, not a constitutional one—my plea is for legislatures to repeal these statutes rather than courts to strike them down—a strong argument can be made that these laws are unconstitutional as applied. At least one circuit court has already taken steps towards invalidating these provisions as a Second Amendment violation. See, e.g., Tyler v. Hillsdale Cty. Sheriff’s Dep’t, 837 F.3d 678, 698 (6th Cir. 2016) (“Under intermediate scrutiny, a statute can permissibly regulate more conduct (or more people) than necessary. However, the amount of overreach must be reasonable, and it is the government’s burden, not Tyler’s, to prove that § 922(g)(4)’s ‘scope is in proportion to the interest served.’” (citations omitted)); see also Keyes v. Lynch, 195 F. Supp. 3d 702, 722 (M.D. Pa. 2016) (finding § 922(g)(4) to violate the Second Amendment because the plaintiff is “‘no more dangerous than a typical law-abiding citizen’ at this point in this life, and that he is not a ‘continuing threat’ to himself or others” (citations omitted)).

¹⁸⁴ See MICHAEL PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 17 (2013) (“‘Sanism’ is an irrational prejudice of the same quality and character of other irrational prejudices [such as] racism, sexism, homophobia, and ethnic bigotry Discrimination pervades the lives of people with psychiatric diagnosis.”); Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. 1351, 1364 (2008) (noting researchers have found that individuals with mental disabilities experience “greater prejudice” than individuals with physical disabilities).

individuals with mental illness.¹⁸⁵

One especially resonant myth about individuals with mental illness is that they are more dangerous than other people.¹⁸⁶ A 2013 national survey found that forty-six percent of Americans believed that persons with serious mental illness were, “by far, more dangerous than the general population.”¹⁸⁷ This is particularly true of individuals with a psychotic disorder, like schizophrenia. In one study, participants were read a vignette describing a person with schizophrenic symptoms.¹⁸⁸ Sixty percent of respondents reported that the individual was somewhat likely, or very likely, to hurt others, even though the description made no mention of violent behavior.¹⁸⁹

The harm that this stigma does to individuals who suffer from mental illness is physical, financial, social, and emotional. In a very real way, our unquestioned link between violence and mental illness, as enshrined in and furthered by our gun laws, makes an individual with mental illness more likely to die from an interaction with police or while in jail, restricts him from earning a living, undercuts support for public programs that could ease the burden of living with mental illness, and discourages him from seeking treatment for his condition.

First, the criminal justice implications. People experiencing symptoms of mental illness are arrested by the police more often for the same crimes than people who are not mentally ill.¹⁹⁰ Police also tend to believe that individuals

¹⁸⁵ See PERLIN, *supra* note 184, at 17-24. (describing myths including not only the dangerousness myth, but also myths such as that those living with mental illness are presumptively incompetent to participate in “normal” activities, should be segregated in large, distant institutions, do not exercise self-restraint, and are lazy, erratic, and morally deviant).

¹⁸⁶ See Swanson et al., *supra* note 38, at 367 (“Negative public attitudes toward persons with serious mental illnesses such as schizophrenia and bipolar disorder are pervasive and persistent in the United States, and the assumption of dangerousness is a key element of this negative stereotype.”).

¹⁸⁷ Colleen L. Barry et al., *After Newtown—Public Opinion on Gun Policy and Mental Illness*, 368 NEW ENG. J. MED. 1077, 1078-80 tbl.2 (2013).

¹⁸⁸ Bernice A. Pescosolido et al., “A Disease Like Any Other”? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence, 167 AM. J. PSYCHIATRY 1321, 1322 (2010).

¹⁸⁹ *Id.* at 1324.

¹⁹⁰ See Patrick Corrigan, *How Stigma Interferes with Mental Health Care*, 59 AM. PSYCHOLOGIST 614, 616 (2004) (discussing that “persons exhibiting signs and symptoms of serious mental illness” face a greater likelihood of arrest by the police); Linda A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOLOGIST 794, 798-99 (1984) (finding that the probability of arrest was twenty percent higher for individuals with symptoms of a mental disorder compared to those without such symptoms); cf. JENNIFER BRONSON & MARCUS BERZOFKY, DEP’T OF JUSTICE, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–2012, at 1 (2017) (finding that forty-four percent of jail inmates had a history of a mental health problem).

with mental illness are more inclined to violence than others.¹⁹¹ This fear may lead to more aggressive reactions to the unpredictable behaviors of individuals with mental illness.

Of the 986 people shot and killed by police in the United States in 2017, at least one in four had a mental health condition.¹⁹² An investigation of police shootings in Portland, Maine, found that fifty-eight percent of those shot and killed by police had a mental health condition.¹⁹³ Even when encounters are not lethal, police use force disproportionately against individuals with mental illness.¹⁹⁴

Studies of these encounters have shown that police perceive individuals with mental illness to be resisting officers at higher rates than individuals without mental illness.¹⁹⁵ It could be that these individuals are actually engaging in these activities at higher rates; it could also be that police officers believe them to be resisting arrest and acting disrespectfully, in part because of the deep-seated societal fear of individuals with mental illness.¹⁹⁶

Even if individuals with mental illness survive their encounters with police, they then are enmeshed in the criminal justice system, where they are more likely to be confined awaiting trial, more likely to be abused physically while awaiting

¹⁹¹ See Dragana Kesic et al., *Use of Nonfatal Force on and by Persons with Apparent Mental Disorder in Encounters with Police*, 40 CRIM. JUST. & BEHAV. 321, 322 (2013) (noting that despite few studies on the topic, “findings suggest[] that many police believe that dealing with persons experiencing mental illness is dangerous because of their propensity for violent behavior”) (citations omitted).

¹⁹² *Fatal Force*, WASH. POST (2017), <https://www.washingtonpost.com/graphics/national/police-shootings-2017/> [<https://perma.cc/R4K5-FYC8>]; see also E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR., JUSTIFIABLE HOMICIDES BY LAW ENFORCEMENT OFFICERS: WHAT IS THE ROLE OF MENTAL ILLNESS? 3 (2013) (summarizing a 2012 investigation, which included hundreds of interviews and thousands of pages of documents, that concluded at least half of the people shot and killed by police between 1980 and 2008 had mental health problems).

¹⁹³ *Deadly Force: Police and the Mentally Ill*, PORTLAND PRESS HERALD (Dec. 8, 2012), http://www.pressherald.com/special/Maine_police_deadly_force_series_Day_1.html [<https://perma.cc/88DP-63RZ>].

¹⁹⁴ Michael T. Rossler & William Terrill, *Mental Illness, Police Use of Force, and Citizen Injury*, 20 POLICE Q. 190, 199-200 (2016); see also Melissa Morabito et al., *The Nature and Extent of Police Use of Force in Encounters with People with Behavioral Health Disorders*, 50 INT’L J. L. & PSYCHIATRY 31, 34-35 (2015) (finding that individuals with a perceived mental illness and/or substance abuse disorders were significantly more likely to have physical force used against them than those with no perceived disorders); Kesic, *supra* note 191, at 331 (finding that police in Victoria, Australia were twice as likely to use pepper spray against those who appeared mentally disordered).

¹⁹⁵ See Melissa Morabito et al., *supra* note 194, at 35 (finding that officers perceived resistance, aggressive resistance, or both in 70.71% of use-of-force encounters with individuals with perceived mental illness; officers perceived individuals with no mental illness to resist 37.44% of the time).

¹⁹⁶ See Kesic et al., *supra* note 191, at 322-23 (noting contrary findings on whether individuals with mental illness acted more aggressively toward police than individuals without mental illness).

trial, and more likely to die while awaiting trial.¹⁹⁷ Just a few examples of this: In New Mexico, defendants found incompetent to stand trial were held before trial for more than a year longer than arrestees without mental health conditions.¹⁹⁸ In South Carolina, guards used force against inmates with mental illness 2.5 times more than against other inmates.¹⁹⁹

Second, employment and housing prospects. Employers are less likely to hire those with mental disabilities.²⁰⁰ This stigma is due, in part, to the perception that those with mental illness are violent and dangerous.²⁰¹ For example, a survey of business students found that, as compared to other disabilities, mental illness produced greater discomfort because the disorder was “seen as . . . threatening.”²⁰² In a different study, sixty-seven percent of employers expressed “discomfort” with hiring someone who is taking antipsychotic medication.²⁰³ One employer, when discussing mental disability, stated, “you have a responsibility to other employees to keep someone who might be unstable—that is, violent—from hurting other employees.”²⁰⁴

Little research has been done on housing discrimination against individuals with mental illness, but the studies so far have shown a similar unwillingness to have individuals with mental illness in close proximity. For example, in one study, prospective renters called landlords about advertised apartments and, in some cases, alluded to a history of mental illness. Callers who mentioned mental illness were three times as likely to be met with a negative response.²⁰⁵ They received the same amount of negative responses as callers who asked for information on behalf of an imprisoned brother.²⁰⁶

¹⁹⁷ McMahon, *supra* note 140, at 613-17 (2019).

¹⁹⁸ *Id.* at 610-11.

¹⁹⁹ *Id.* at 615.

²⁰⁰ See Stijn Baert et al., *First Depressed, then Discriminated Against?*, 170 SOC. SCI. & MED. 247, 253 (2016) (finding that, for individuals who disclose depression as the reason for a year of unemployment, the probability of being asked for a job interview decreased by about a third as compared to those who had no break in employment); cf. Teresa L. Scheid, *Stigma as a Barrier to Employment: Mental Disability and the Americans with Disabilities Act*, 28 INT’L J. OF L. & PSYCHIATRY 670, 682 (2005) (finding that companies who did not comply with ADA requirements on hiring individuals with mental disabilities were more likely to hold stigmatizing attitudes toward people with mental illness).

²⁰¹ Scheid, *supra* note 200, at 674. The stigma is borne of other false perceptions as well: that individuals with mental illness are not only dangerous, but also “unpredictable, . . . irrational, slow, stupid, and unreliable.” *Id.* at 673.

²⁰² *Id.* at 674 (citing Gary L. Albrecht et al., *Social Distance from the Stigmatized: A Test of Two Theories*, 16 SOC. SCI. & MED. 1319 (1982)).

²⁰³ Teresa L. Scheid, *Employment of Individuals with Mental Disabilities: Business Response to the ADA’s Challenge*, 17 BEHAV. SCI. & L. 73, 87 (1999).

²⁰⁴ *Id.*

²⁰⁵ Stewart Page, *Effects of the Mental Illness Label in Attempts to Obtain Accommodation*, 9 CANADIAN J. BEHAV. SCI. 85, 88 (1977).

²⁰⁶ *Id.* at 87-88.

This hesitance is likely due to the fear many in the public feel for individuals with mental illness. In one recent poll, when people were asked how they felt about an individual with serious mental illness living next door to them, forty-seven percent expressed discomfort with the idea.²⁰⁷

Community opposition to housing projects for individuals with mental illness provides further anecdotal confirmation that these individuals are feared as dangerous and face discrimination in housing as a result. While opponents to such projects often cite supposedly neutral concerns such as traffic or property values as the source of their protest, case studies indicate that the concerns are more often driven by negative stereotypes, such as the fear that residents with mental illness will become violent. For example, in Great Britain, a new community residence was met with protestors carrying signs that said “Paranoid Schizophrenic Out!” and “Keep Our Children Safe!”²⁰⁸ In New York, a concerned resident at a meeting for a planned housing for people with mental illness asked, “Do we need to be concerned that these people will be out for the day and just grab and stab someone?”²⁰⁹

Third, allocation of public resources. While this phenomena has not been studied extensively in the realm of mental health, at least one study indicated that when the public fears people with mental illness or perceives them as dangerous, they are less likely to support allocation of resources to programs designed to help those individuals.²¹⁰ Perhaps as a result, less money is spent on research of mental illness than on other health disorders.²¹¹

Treatment of mental health conditions is also drastically underfunded. The budgets of public mental health facilities have been cut and available bed space is woefully inadequate, which leaves many symptomatic people locked out of

²⁰⁷ HENRY J. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: FEBRUARY 2013 (2013), <https://www.kff.org/disparities-policy/poll-finding/kaiser-health-tracking-poll-february-2013/> [<https://perma.cc/6F7R-39X8>].

²⁰⁸ PHILIP T. YANOS, WRITTEN OFF: MENTAL HEALTH STIGMA AND THE LOSS OF HUMAN POTENTIAL 51 (2018).

²⁰⁹ *Id.*

²¹⁰ See Patrick Corrigan et al., *Stigmatizing Attitudes about Mental Illness and Allocation of Resources to Mental Health Services*, 40 COMMUNITY MENTAL HEALTH J. 297, 298 (2004) (suggesting that prejudice against individuals with mental illness may result in less funding for mental health services promoting independent living); Patrick Corrigan et al., *An Attribution Model of Public Discrimination Towards Persons with Mental Illness*, 44 J. HEALTH & SOC. BEHAV. 162, 172-73 (2003) (finding that perceptions of dangerousness may result in support for coercive treatment and withholding of help); see also Swanson, *supra* note 38, at 367 (“Public perceptions and attitudes towards persons with mental illness are important to public policy, because people act on the basis of their beliefs, and they tend to support policies that assume those beliefs and perceptions to be true.”).

²¹¹ PATRICK W. CORRIGAN, THE STIGMA EFFECT 53 (2018).

mental health treatment altogether.²¹² Many psychiatrists and other mental health professionals also often opt out of the public mental health care system, where most individuals with severe mental illnesses are treated, leaving facilities understaffed and few options for community care.²¹³ This is unsurprising; private health systems are better funded than public ones, and their employees can earn better salaries and benefits.²¹⁴

Fourth, treatment-seeking behavior. Less than thirty percent of individuals with a mental health condition attempt to treat it.²¹⁵ Even those who do seek treatment usually fail to adhere to their treatment regimens; on average, more than forty percent of individuals receiving antipsychotic medication failed to take the medication as prescribed.²¹⁶

One factor driving this failure is the shame associated with mental illness. The label of “dangerous,” and the shame that such a label carries, can discourage individuals from seeking mental health treatment. People who expressed a sense of shame about mental illness were less likely to seek treatment, as were people who believed family members would be ashamed of a relative diagnosed as mentally ill.²¹⁷

To sum up, a narrative that individuals with mental illness are dangerous contributes to their arrest and abuse by police, their detention in jails and institutions, their poverty and homelessness, and underfunding of programs to help them, and imposes such shame that individuals are unwilling to seek treatment. Associating the mentally ill with violent acts, as statutes barring them from possessing weapons implicitly do, hardens this connection and thus worsens all the harms that result from the dangerousness stigma.

²¹² See, e.g., NAT’L ALL. ON MENTAL ILLNESS, STATE MENTAL HEALTH CUTS: A NATIONAL CRISIS 1 (2011) (noting that states had cut \$1.6 billion in mental health spending from 2009 to 2011); Michelle R. Smith, *Kennedy’s Vision for Mental Health Never Materialized*, MODERN HEALTHCARE (Oct. 20, 2013), <https://www.modernhealthcare.com/article/20131020/INFO/310209993/kennedy-s-vision-for-mental-health-never-realized> [https://perma.cc/RB2Z-2LNV] (“[A]bout 90 percent of beds have been cut at state hospitals In many cases, several mental health experts said, that has left nowhere for the sickest people to turn”).

²¹³ CORRIGAN, *supra* note 211, at 53-54; see also NAT’L ALL. ON MENTAL ILLNESS, *supra* note 212, at 6-8 (outlining the far-reaching implications of budget cuts, resulting in the unavailability of crucial mental health services).

²¹⁴ CORRIGAN, *supra* note 211, at 53-54.

²¹⁵ Patrick Corrigan, *How Stigma Interferes with Mental Health Care*, 59 AM. PSYCHOLOGIST 614, 615 (2004).

²¹⁶ *Id.*

²¹⁷ *Id.* at 618.

IV. FLAWS IN THE JUSTIFICATIONS FOR MENTAL ILLNESS GUN BANS

Despite the many problems with mental illness gun bans, they remain wildly popular, likely for two reasons. First, these bans make intuitive sense. Society harbors a deep fear of individuals with mental illness, and no less an authority than the Supreme Court has called these kinds of laws constitutional restrictions on the right to bear arms.²¹⁸ Second, it is one of the few areas upon which gun safety advocates and gun rights advocates can reach agreement and thus seems to be fertile soil for compromise.²¹⁹

Both of these reasons are specious in light of the ineffectiveness of mental illness gun bans and the great harms they cause individuals living with mental health conditions, as outlined above. Yet other justifications for this approach may hold some weight. From an empirical perspective, the risk of suicide by firearm is high among individuals with mental illness and may be a valid reason to prohibit those with mental illness from owning these weapons.²²⁰ From a public policy perspective, opponents of eliminating these laws could argue that removing them will have its own negative effects that may outweigh even the harm from the dangerousness stigma.

While these arguments do give me pause, they ultimately do not outweigh the damage wrought by these statutes, as illustrated in more detail below.

A. Guns and Suicide

The one circumstance where the evidence may support a ban on individuals with mental illness from possessing firearms is when those individuals are at risk of suicide. While this is rarely used as the justification for mental illness gun bans,²²¹ it is the justification that has the most empirical support and the support of experts in mental illness and gun policy.²²² Yet even this justification fails under scrutiny.

²¹⁸ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

²¹⁹ *See, e.g.*, Marjory Stoneman Douglas High School Public Safety Act, S. 7026, § 10, 2016 Sen., Reg. Sess. (Fl. 2018) (including provision banning those adjudicated as “mental defective” or committed to a mental institution from possessing firearms); Domenico Montanaro, *Poll: Most Americans Want to See Congress Pass Gun Restrictions*, NPR (Sept. 10, 2019), <https://www.npr.org/2019/09/10/759193047/poll-most-americans-want-to-see-congress-pass-gun-restrictions> (describing results from a poll that showed the highest proportion of people—eighty-nine percent—favored increasing funding for mental health screenings and treatment as a solution to gun violence).

²²⁰ *See* Frederick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 23 (2013) (“[T]he stronger, and probably constitutionally adequate, rationale [for gun restrictions] is suicide prevention.”).

²²¹ *Id.*

²²² *See, e.g.*, CONSORTIUM FOR RISK-BASED FIREARM POLICY, GUNS, PUBLIC HEALTH, AND MENTAL ILLNESS 3 (2013) (recommending stronger state laws to prevent gun ownership following short-term involuntary hospitalization).

First, the risks. Of the 39,773 people fatally shot in 2017, nearly two-thirds (23,854 people) died by suicide.²²³ It is, by far, the largest death toll by guns in the United States.²²⁴

Studies have indicated that mental illness increases the danger of an individual dying by suicide.²²⁵ As one meta-analysis noted, “[V]irtually all mental disorders have an increased risk of suicide excepting mental retardation and possibly dementia and agoraphobia.”²²⁶ And in psychological autopsies of individuals who died by suicide—meaning reviews of that person’s medical history and interviews with family and friends after their death—ninety-one percent of those who died had a diagnosable mental disorder, most often a mood disorder such as major depression.²²⁷

In addition, suicide attempts with a firearm tend to be vastly more successful than attempts by other means. One study showed that 82.5% of suicide attempts involving a gun resulted in death; the next-highest successful means—drowning—was only successful about sixty-six percent of the time.²²⁸ Suicide by ingesting poison or cutting oneself was successful less than two percent of the time.²²⁹

The conclusion from these two data points seems fairly straightforward: Individuals with mental illness have a high risk of suicide and should be prevented from possessing firearms, which make suicide attempts more deadly.²³⁰ But some wrinkles complicate this story.

First, most individuals with a mental illness will not die by suicide. The lifetime risk for dying by suicide is somewhere between two and eight percent for individuals who live with mental disorders,²³¹ and it is nearly impossible to

²²³ CTRS. FOR DISEASE CONTROL AND PREVENTION, WONDER DATABASE, FIREARMS DEATHS BY INTENT, 1999-2017 (2017), <https://wonder.cdc.gov/controller/datarequest/D76;jsessionid=806629A0D9826D46E3BD-A91A8557D4F6> [<https://perma.cc/T3BX-DAQ5>].

²²⁴ *See id.* (noting that homicides, the second-highest injury intent, accounted for 14,542 firearms deaths in 2017).

²²⁵ *See, e.g.*, E. Clare Harris & Brian Barraclough, *Suicide as an Outcome for Mental Disorders*, 170 BRIT. J. PSYCHIATRY 205, 222 (1997) (conducting a meta-analysis and finding an increased suicide risk for most mental disorders).

²²⁶ *Id.*

²²⁷ Jonathan Cavanagh et al., *Psychological Autopsy Studies of Suicide: A Systematic Review*, 33 PSYCHOL. MED. 395, 399 (2003).

²²⁸ Rebecca S. Spicer & Ted R. Miller, *Suicide Acts in 8 States: Incidence and Case Fatality Rates by Demographics and Method*, 90 AM. J. PUB. HEALTH 1885, 1888 (2000).

²²⁹ *Id.*

²³⁰ Many scholars and mental health experts agree with this conclusion. *See, e.g.*, CONSORTIUM FOR RISK-BASED FIREARM POLICY, *supra* note 222, at 3 (recommending stronger state laws to prevent gun ownership following short-term involuntary hospitalization).

²³¹ *See* Merete Nordentoft et al., *Absolute Risk of Suicide After First Hospital Contact in Mental*

predict who in the group labeled mentally ill will take their own lives.²³² One group of researchers took a group of depressed patients and attempted to design a model that would predict which ones would die by suicide. Not a single prediction was correct; every person tagged as likely to die by suicide did not do so, and the program missed every person who did die by suicide.²³³ This stunning failure led one researcher to conclude that “suicide is difficult or impossible to predict, even among a high-risk group of inpatients.”²³⁴

Thus, even if suicide were the justification for banning firearms from those with mental health conditions, it would vastly overreach. Such a restriction paints all individuals with mental illness as suicidal, when that is not the case.

Second, suicide is often not the endpoint of a steady march through worsening depression, as many imagine it to be. While some individuals undergo treatment and suffer depression for many years before completing suicide,²³⁵ many others, up to fifty-four percent, according to a recent study, did not have a previously known mental health issue.²³⁶ For these individuals, suicide is spurred by despair, dark nights of the soul, or a major negative life event—loss of wealth or status, loss of a loved one through death or divorce, or loss of physical health.²³⁷

Retrospective studies of suicides, like the psychological autopsies mentioned above, further the “we should have seen it coming” narrative, which is often incorrect. Psychological autopsies of persons who died by suicide rest on

Disorder, 68 ARCH. GEN. PSYCHIATRY 1058, 1061 (2011) (identifying the absolute risk rates for suicide).

²³² See Rise B. Goldstein et al., *The Prediction of Suicide: Sensitivity, Specificity, and Predictive Value of a Multivariate Model Applied to 1906 Patients with Affective Disorders*, 48 ARCHIVES GEN. PSYCHIATRY 418, 422 (1991) (concluding that it is unrealistic to expect medical professionals to predict suicide based on logistic progression studies).

²³³ *Id.* at 420.

²³⁴ José Manoel Bertolote et al., *Psychiatric Diagnosis and Suicide: Revisiting the Evidence*, 25 CRISIS 147, 147 (2004).

²³⁵ See Nell Greenfield Boyce, *CDC: U.S. Suicide Rates Have Climbed Dramatically*, NPR (June 7, 2018), <https://www.npr.org/sections/health-shots/2018/06/07/617897261/cdc-u-s-suicide-rates-have-climbed-dramatically> [<https://perma.cc/L3C7-HKNZ>] (noting that Michael Anestis, who researches suicide, “thinks the general public commonly pictures someone who had been getting treatment for a long period before killing themselves, like fashion designer Kate Spade, who died this week, but that's often not the case”).

²³⁶ *Id.*

²³⁷ See, e.g., Maria Christina Verrochio et al., *Mental Pain and Suicide: A Systematic Review of the Literature*, FRONTIERS IN PSYCH. 7:108, at 11 (2016) (“the results indicate that levels of mental pain are associated with an increased risk of suicide, independently from the severity of depressive condition?”); Greenfield Boyce, *supra* note 235 (citing author of a study on increased suicide rates who said that “[people with no mental health diagnosis] were suffering from other issues, such as relationship problems, substance misuse, physical health problems, job or financial problems, and recent crises or things that were coming up in their lives that they were anticipating”).

interviews with individuals close to the person.²³⁸ Such studies are susceptible to hindsight biases; when looking back on a life that ended in suicide, it is difficult to avoid the conclusion that signs of depression were apparent all along.²³⁹

By insisting upon the suicide-mental illness connection, we leave much of the population vulnerable. Studies from non-western countries have shown the impact of risk factors aside from mental illness. In South Asian countries, gender roles, cultural expectations, family conflict, and domestic violence heightened rates of female suicide, while alcohol use, financial issues, and interpersonal conflict are risk factors for male suicide in India.²⁴⁰ A focus solely on mental illness as the suicide risk leaves vulnerable many people who cannot cope with life stressors.

Third, the stigma surrounding mental health conditions, which mental illness gun bans help to perpetuate, could itself worsen the suicide risk. Individuals may be less likely to seek treatment for fear of the danger label, and lack of treatment increases suicide risk.²⁴¹ Moreover, feelings of shame have been linked to suicide, and researchers suspect that some portion of the suicides associated with mental illness happen because the person sees herself as “defective and humiliated.”²⁴² Researchers have noted that suicide risk is highest shortly after treatment begins,²⁴³ which could indicate that the shame of a new mental illness diagnosis was a contributing cause.²⁴⁴ It could be that laws that implicitly label people as dangerous actually heighten the risk of suicide.

A mental illness gun ban is therefore a blunt instrument in suicide

²³⁸ Alison Milner et al., *Suicide in the Absence of Mental Disorder? A Review of Psychological Autopsy Studies Across Countries*, 59 INT’L J. SOC. PSYCHIATRY 545, 545 (2012).

²³⁹ As Jesse Bering writes,

The oft-cited “90%” figure—that 90 percent of suicides are attributable to mental illness—is in fact dubious. It’s derived primarily from postmortem analyses (psychological autopsies), which are almost certainly subject to hindsight bias. When experts are given edited case histories of people who died by suicide without knowing they’ve taken their own lives, they are far less likely to see a mental illness.

Jesse Bering, *Sometimes, You Won’t Feel Better Tomorrow*, SLATE (Feb. 15, 2019), <https://slate.com/technology/2019/02/mental-illness-suicide-rational-thought-getting-help.html> [<https://perma.cc/K5K5-JBEU>].

²⁴⁰ Milner et al., *supra* note 238, at 552.

²⁴¹ See Bertolote et al., *supra* note 234, at 153 (advocating for suicide prevention efforts to include treatment for mental health conditions).

²⁴² See, e.g., David Lester, *The Role of Shame in Suicide*, 27 SUICIDE & LIFE-THREATENING BEHAV. 352, 357 (1997) (noting that, following partial recovery from mental illness, patients may experience feelings increasing the chance of suicide).

²⁴³ See, e.g., Nordentoft et al., *supra* note 231, at 1061 (“The suicide risk [of people age 15 to 51] increased steeply during the first few years after first contact with psychiatric services.”).

²⁴⁴ See Megan L. Ranney & Jessica Gold, *The Dangers of Linking Gun Violence and Mental Illness*, TIME (Aug. 7, 2019), <https://time.com/5645747/gun-violence-mental-illness> [<https://perma.cc/M89J-7PG2>] (“We have seen patients attempt suicide after a diagnosis of a serious mental illness, believing their life was over anyway.”).

prevention efforts that has deeply negative side effects, and a more individualized approach would likely see greater success without imposing the attendant harms. Extreme risk protection orders are one possibility. These laws allow police to remove guns from individuals who are showing signs of future violence against themselves or others and have shown some success in reducing suicide rates.²⁴⁵ In Connecticut, for example, a judge can issue a warrant for the seizure of a person's guns if there is probable cause to believe the individual poses a risk of imminent personal injury to himself or others.²⁴⁶ The judge considers whether the person has recently made threats; she also can look to whether the person has brandished a firearm, used physical force against others in the past, been involuntarily committed to a psychiatric facility, or used illegal substances.²⁴⁷ One recent study of this law showed that a suicide was prevented for every ten to eleven gun seizures that occurred.²⁴⁸

Another option is to allow individuals to opt-in to a waiting period for a gun purchase.²⁴⁹ Professor Frederick Vars has proposed allowing people to place themselves on a “No-Guns List” that would prohibit them from purchasing firearms, which he conceived of as a way for people to protect themselves against suicidal impulses.²⁵⁰ Once on the list, the individual can only remove herself after a seven-day waiting period.²⁵¹ This precommitment against suicide both restricts access to lethal means at times of crisis and provides individuals

²⁴⁵ Fourteen states and the District of Columbia have passed extreme risk protection order laws. CAL. PENAL CODE §§ 18125, 18150, 18175 (West, Westlaw through ch. 870 of 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 29-38c (West, Westlaw through 2019 Jan. Reg. Sess. and 2019 July Spec. Sess.); DEL. CODE ANN. tit. 10, §§ 7701-09 (West, Westlaw through ch. 219 of 150th Gen. Assembly (2019-2020)); 2018 D.C. CODE ANN. §§ 7-2510.01 to 7-2510.12 (West, Westlaw through Nov. 26, 2019); FLA. STAT. ANN. § 790.401 (West, Westlaw through 2019 1st Reg. Sess. of the 26th Legislature); 430 ILL. COMP. STAT. ANN. 67/1-80 (West, Westlaw through P.A. 101-592); IND. CODE ANN. §§ 35-47-14-1, -2, -5, -6 -8 (West, Westlaw through 2019 1st Reg. Sess. of the 121st Gen. Assembly); MD. CODE ANN., PUB. SAFETY §§ 5-601 to -610 (West, Westlaw through 2019 Reg. Sess. of Gen. Assembly); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 129B(1 1/2), 131C, 131R-Y (West, Westlaw through ch. 88 of 2019 1st Ann. Sess.); N.J. STAT. ANN. §§ 2C:58-20 to -32 (West, Westlaw through L.2019, c. 267 and J.R. No. 22); N.Y. C.P.L.R. LAW §§ 6340-47, N.Y. PENAL LAW § 265.45 (McKinney, Westlaw through L.2019, ch. 574); OR. REV. STAT. ANN. §§ 166.525-.543 ((LexisNexis, Lexis through 2019 Reg. Sess.); VT. STAT. ANN. tit. 13, §§ 4051-61 (West, Westlaw through Acts of Reg. Sess. of the 2019-2020 Vt. Gen. Assembly (2019)); R.I. GEN. LAWS ANN. §§ 8-8.3-1 to 8-8.3-14 (West, Westlaw through ch. 310 of 2019 Reg. Sess.); WASH. REV. CODE ANN. §§ 7.94.030, 7.94.040, 7.94.050, 7.94.080 (West, Westlaw through 2019 Reg. Sess. of the Wash. Legislature).

²⁴⁶ CONN. GEN. STAT. ANN. § 29-38c.

²⁴⁷ *Id.*

²⁴⁸ Jeffrey Swanson et al., *Implementation and Effectiveness of Connecticut's Risk-Based Gun Removal Laws: Does It Prevent Suicides?*, 80 LAW & CONTEMP. PROBS. 179, 203 (2017).

²⁴⁹ Frederick Vars, *Self-Defense Against Gun Suicide*, 56 B.C. L. REV. 1465, 1468 (2015).

²⁵⁰ *Id.* at 1469.

²⁵¹ *Id.*

with a measure of control over a situation that often feels uncontrollable.²⁵²

Proposals like these are tailored to individual situations and respond to clear risks. They thus avoid the stigmatizing effect of a blanket ban and would likely be a more effective means of suicide prevention.

B. Policy-Based Counterarguments

A few responses to the argument that we should eradicate gun laws because they are both ineffective and stigmatizing: First, one might say that the stigma against individuals with mental illness predated gun laws and would exist even in the absence of such laws, so this change would not reap any benefits and would come at the cost of prohibiting some number of dangerous people from obtaining firearms. One might also argue that even if gun laws prohibiting possession by individuals with mental illness worsen stigma, that is still a price worth paying for fewer guns in circulation. A final counterargument is that passage of gun safety measures is so difficult that half-measures like a mental illness gun ban is the best we will ever do. I address each of these counterpoints below.

1. Stigma Will Continue

While it is true that reversing course on guns would not eradicate stigma against individuals with mental illness, it would eliminate one of the clearest signals that society considers these people dangerous. De-linking guns and individuals with mental illness is one of the best tools society has to acknowledge that it was wrong in its assumption that mental illness equates with violence.

First, while the dangerousness stigma undoubtedly existed before the Gun Control Act and likely was a driver of the prohibitions on possession found there, that law legitimates the stigma. Courts and academics have recognized the power laws have in this realm.²⁵³ When stigma carries the legislative stamp of

²⁵² *Id.* at 1470-71.

²⁵³ *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (“[L]aws excluding same-sex couples from the marriage right impose stigma and injury”); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1955) (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.” (citations omitted)); *cf.* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 78 (1996) (“Races are social products. It follows that legal institutions and practices, as essential components of our highly legalized society, have had a hand in the construction of race.”); Susan Yeh, *Laws and Social Norms: Unintended Consequences of Obesity Laws*, 81 U. CIN. L. REV. 173, 176 (2013) (“Where anti-obesity dietary education laws are stricter, social stigma increases for obese girls. On the other hand, the education penalty that obese women experience is mitigated under anti-obesity laws.”); Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 496 (2006) (“Legislation has an expressive function. Lawmakers regularly enact laws to express social values they attach to certain behavior.

approval, when society's elective bodies have said "we deem you dangerous," that stigma hardens into truth.

As one sociologist said in his testimony during a hearing on the constitutionality of California's Proposition 8, a law which had prohibited same-sex marriage:

As we all know, the law in the state is a very important party to creating the social environment. So clearly it's not the only thing that determines even experiences of prejudice and discrimination, but it is certainly a very major player, major factor, in creating this social environment that I described as prejudicial or stigmatizing.²⁵⁴

Second, even if the repeal of a mental illness gun ban does not erase stigma altogether, the act of removing the law could begin to drive social change. The legislative debate surrounding repeal could force a conversation about the lack of connection between mental illness and violence that would itself prove illuminating for much of the public. Drives to eradicate laws that further bias without accomplishing a societal good, even unsuccessful ones, can alone do some of the work of erasing stigma.²⁵⁵

Thus, while repeal of gun possession laws targeting individuals with mental illness may not entirely solve the problem of stigma, it would at least remove society's imprimatur from the assumption that individuals with mental illness pose a danger. At the same time, the debate over repeal itself, even if unsuccessful, could change public perceptions of individuals with mental illness.

2. Guns Are Dangerous, and Fewer Guns Is a Good Thing

One might also argue that any correlation with violence—even a weak one—is sufficient reason to prohibit possession of a dangerous item like a gun. Moreover, preventing certain classes of people from obtaining guns keeps the number of these dangerous items in circulation lower than it otherwise would be.

But there are many characteristics that are correlated with violence: some studies have indicated that having a military background or living in a high-crime

By applying this expressive function of legislation, legislators act as norm entrepreneurs."); Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOCIOLOGY 363, 378 (2001) (noting that all groups develop stereotypes of other groups, but, for the purposes of originating stigma, "what matters is whose cognitions prevail—whose cognitions carry sufficient clout in social, cultural, economic, and political spheres to lead to important consequences for the group that has been labeled as different").

²⁵⁴ Transcript of Proceedings at 880, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

²⁵⁵ Cf. Carol Galletly et al., *Criminal HIV Exposure Laws: Moving Forward*, 18 AIDS BEHAV. 1011, 1011-12 (2014) (describing government advisory groups moving from recommending circumscribed uses of criminal law to combat HIV to opposing such measures outright).

neighborhood is just as much a predictor of violence as having a serious mental health condition.²⁵⁶ Yet legislators or pundits would never speak of banning guns from these groups, even though the benefit of fewer guns in circulation would also be realized with those prohibitions.

Society is more comfortable with banning guns from individuals living with mental illness because it fears them, because it sees them as other.²⁵⁷ We happily infringe on the rights of this group, even though other groups pose roughly the same small risks. Unless and until legislators are prepared to also ban guns from military veterans or people living in certain neighborhoods, then all a mental illness gun ban does is harden the dangerousness stigma and worsen all the associated negative effects discussed above.

In some ways, a mental illness gun ban is more harmful than bans on other groups would be. The number of people captured by a mental illness gun ban is small, as serious mental illness is relatively rare in the population. Stigma can be worse against small groups, where few people know someone personally affected by mental illness.²⁵⁸ In addition, individuals living with mental health conditions are over twice as likely to be the victims of violent crime than other people.²⁵⁹ If one reason to own a gun is to be able to defend oneself, individuals with mental health conditions likely have more of a need for guns than others.

A better solution exists that avoids unnecessarily targeting this marginalized group. As I illustrate in more detail below, a ban that shifts from a focus on mental illness to one more targeted to behaviors such as past violent acts or substance abuse²⁶⁰ would be more effective in capturing the group of people who pose a risk, whether they have been diagnosed with mental illness or not.²⁶¹ And if fewer guns on the street is the goal, then such a ban prohibits a far broader swath of people from owning a firearm.

²⁵⁶ See FED. BUREAU OF INVESTIGATION, A STUDY OF THE PRE-ATTACK BEHAVIORS OF ACTIVE SHOOTERS, *supra* note 41, at 11 (noting that twenty-five percent of active shooters had diagnosed mental illnesses, while twenty-four percent had a military background); Steadman et al., *supra* note 91, at 400 (noting that both individuals who lived in the comparison neighborhoods and individuals living with mental health conditions had elevated rates of violence).

²⁵⁷ See PERLIN, *supra* note 32.

²⁵⁸ See Jennifer E. Boyd et al., *The Relationship of Multiple Aspects of Stigma and Personal Contact with Someone Hospitalized for Mental Illness, in a Nationally Representative Sample*, 45 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1063, 1067 (2010).

²⁵⁹ See, e.g., Virginia Aldigé Hiday et al., *Criminal Victimization of Persons with Severe Mental Illness*, 50 PSYCHIATRIC SERV. 62, 66 (1999) (finding that individuals with severe mental illness experienced violent crime at a rate two-and-a-half times higher than the general population).

²⁶⁰ While substance abuse disorder is itself a type of mental illness, see DSM-5, *supra* note 27, this proposal would focus bans less on the status of mental illness in general and more on a specific behavior that is highly correlated with violent acts.

²⁶¹ See *infra* Part V.

3. This Is the Best We Can Do

This approach holds that this wholly inadequate and inapt regulation is the best we can possibly do—a position that has neither empirical support nor moral force. Two points in response: First, the politics of gun regulation are in flux, and positions once thought politically untenable are being unapologetically put forward by politicians.²⁶² Moreover, the Supreme Court has already blessed the concept of prohibiting dangerous people from obtaining guns by implicitly approving prohibitions on individuals with mental illness and felons.²⁶³ Adjustments to the law that better identify who falls into the category of dangerous—one that tags those with violent histories and substance abuse problems rather than those who have been confined to a mental health facility or adjudicated incompetent—is well within the realm of constitutional and political possibility.

Second, even if there were no prospects for better gun laws, even if this was the best we could do, this critique ignores the harm that laws implicitly linking mental illness and dangerous behavior are doing right now to individuals with a mental health condition. It allows that stigma to continue for the sake of keeping laws on the books that do little to actually stem gun violence.

Ineffective and harmful gun control laws are worse than no gun control laws at all, both because they are causing harm without achieving substantial benefit and because they may stymie future efforts in this arena. The passage of mental illness gun bans—laws that reflect agreement on both sides that individuals with mental illness are dangerous—likely sacrifices legislation that would both be more effective and not exacerbate harmful prejudices. The instinct to get some gun control, any gun control, passed does more harm than good.²⁶⁴

V. TOWARD SMARTER GUN LAWS

If lawmakers continue to focus on mental illness gun bans as a solution to gun violence, it will not only be ineffective and stigmatizing, but will also distract lawmakers from those risk factors that better predict violence.

Two main categories of individuals have an elevated risk of violence: those

²⁶² See, e.g., German Lopez, *How the Parkland Shooting Changed America's Gun Debate*, VOX (Dec. 26, 2018), <https://www.vox.com/2018/12/26/18145305/gun-control-violence-parkland-effect-2018> [<https://perma.cc/HZ62-HVTQ>] (discussing the increase of politicians in 2018 elections who ran on gun control platforms).

²⁶³ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

²⁶⁴ See Marilyn Price et al., *Mental Illness and the National Instant Criminal Background Check System*, in *GUN VIOLENCE AND MENTAL ILLNESS* 144-145 (Liza H. Gold & Robert I. Simon eds., 2016) (“One of the most significant consequences of pursuing such policies is that they divert attention from and support for more evidence-based legislative interventions, while creating the mistaken perception that ‘something is being done’ to decrease the morbidity and mortality of firearm violence.”).

who have committed violence in the past and those under the influence of alcohol or drugs.²⁶⁵ The best predictor of future violence is past violence, and studies have shown, again and again, that an individual who has acted violently in the past is more likely to do the same in the future.²⁶⁶ One study of homicide arrest records in Illinois found that of individuals arrested for murder, thirty-seven percent had a previous arrest for a violent crime.²⁶⁷ An intervention that dropped the homicide risk of those with a violent arrest to that of those without would reduce the homicide rate by 31.7%.²⁶⁸

Similarly, male handgun purchasers with exactly one violent misdemeanor conviction were eight times more likely to be charged with a later gun crime or violent crime than a person with no record.²⁶⁹ A handgun purchaser with more than one previous violent convictions was ten times more likely to be arrested for a violent crime.²⁷⁰

Substance abuse is also tightly linked to violent acts. As one meta-analysis stated, “the overall impression is fairly convincing, that drug abuse, in addition to alcohol abuse, is implicated either as a cause, or as a predisposing factor, in violent behavior.”²⁷¹ As another study noted, those with substance abuse disorders may be more dangerous than those with schizophrenia and other psychotic disorders.²⁷²

Current federal gun law prohibits some of these individuals from obtaining firearms by barring possession by felons, fugitives, persons convicted of a misdemeanor crime of domestic violence, persons subject to a domestic violence restraining order, and unlawful users of—or those addicted to—a controlled substance.²⁷³ Yet expanding the scope of these categories, as a coalition of mental health and gun violence prevention experts recently suggested, would capture a wider swath of individuals with violent pasts or who have engaged in substance abuse. This group proposed prohibiting from

²⁶⁵ CONSORTIUM FOR RISK-BASED FIREARM POLICY, *supra* note 222, at 19-20.

²⁶⁶ *Id.*

²⁶⁷ Philip J. Cook et al., *Criminal Records of Homicide Offenders*, 294 JAMA 598, 599 (2005).

²⁶⁸ *Id.* As the authors acknowledge in the study itself, using arrest metrics is a fraught calculus because individuals may not be factually guilty of the crime for which they are arrested. But an arrest indicates police at least had probable cause that the person committed a violent act, which gives support to the thesis that those who have acted violently in the past have a higher risk of doing so again in the future. *Id.* at 600.

²⁶⁹ Garen J. Wintemute et al., *Subsequent Criminal Activity Among Violent Misdemeanants Who Seek to Purchase Handguns: Risk Factors and Effectiveness of Denying Handgun Purchase*, 285 JAMA 1019, 1020 (2001).

²⁷⁰ *Id.*

²⁷¹ Alfred S. Friedman, *Substance Use/Abuse as a Predictor to Illegal and Violent Behavior: A Review of the Relevant Literature*, 3 AGGRESSIVE AND VIOLENT BEHAV. 339, 350 (1998).

²⁷² Seena Fazel et al., *Schizophrenia and Violence: Systematic Review and Meta-Analysis*, 6 PLOS MED., Aug. 2009, at 1, 12.

²⁷³ 18 U.S.C. § 922(g) (2018).

firearms possession: (1) those convicted of a violent misdemeanor; (2) those subject to a temporary domestic violence restraining order; (3) those convicted of two or more drunk driving offenses in five years; and (4) those convicted of two or more misdemeanor crimes involving a controlled substance in a period of five years.²⁷⁴

Lawmakers could go even further and institute a licensing scheme, like one in Massachusetts, that allows local licensing authorities to deny gun licenses if existing factors (such as multiple domestic violence calls or repeated episodes of public drunkenness) suggest the individual presents a risk to public safety.²⁷⁵ Extreme risk protection orders, or red flag laws, could also allow police to seize guns from individuals who committed violent acts—such as making threats or assaulting others—or abused substances, but who did not have an arrest or commitment record.²⁷⁶

When legislators hone in on mental illness as the cause of gun violence, they miss opportunities to expand criteria focused on past violence and substance abuse. Targeting individuals with mental illness creates the sense that the problem is solved. The result has been proposals that tinker with the existing system—that strengthen background checks²⁷⁷ or prohibit larger groups of individuals with mental illness from obtaining guns²⁷⁸—but will do little to stop the tsunami of firearms that continues to wash over the country.²⁷⁹

Factors such as past violence or substance abuse issues were more prevalent than mental health diagnoses in many recent mass shootings. Omar Mateen, who killed forty-nine people at the Pulse nightclub in Orlando, had no mental

²⁷⁴ CONSORTIUM FOR RISK-BASED FIREARM POLICY, *supra* note 222, at 3. The Consortium also recommended maintaining and expanding firearms restrictions for those involuntarily hospitalized as mentally ill, a position with which this Article disagrees.

²⁷⁵ MASS. GEN. LAWS ANN. ch. 140, § 131(d) (West, Westlaw through ch. 88 of 2019 1st Ann. Sess.). These restrictions apply to a license to carry, which allows an individual to possess any firearm and concealed carry. If the person is applying for a firearms identification card, which allows for possession of certain rifles or shotguns, they must still go through the permitting process, but the licensing authority must petition a court to deny the license. *Id.* §§ 129B, 129C.

²⁷⁶ *See, e.g.*, CONN. GEN. STAT. ANN. § 29-38c(b) (West, Westlaw through 2019 Jan. Reg. Sess. and 2019 July Spec. Sess.) (allowing a judge to seize a defendant's weapons if she makes threats, brandishes a weapon, or uses illegal substances, among other indicators of dangerousness).

²⁷⁷ *See* Bipartisan Background Checks Act of 2019, H.R. Res. 8, 116th Cong. (2019) (requiring federal background checks for every gun sale).

²⁷⁸ WHITE HOUSE, *supra* note 13.

²⁷⁹ 393 million firearms are in American civilian hands, outpacing the entire U.S. population of 326 million people. AARON KARP, SMALL ARMS SURVEY, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS 4 (2018).

illness history.²⁸⁰ He passed the background checks required for a concealed carry permit and purchased his guns legally.²⁸¹ But he had a history of domestic violence and his wife called police in 2009 after he strangled her.²⁸² Expanded prohibitions encompassing past violent acts could have prevented his gun purchases. Jared Loughner was found incompetent to stand trial after the Tucson shooting,²⁸³ but, prior to the shooting, had none of the concrete indicators of mental illness required by all possession prohibition regimes currently in force. Yet he was arrested in 2007 for drug possession²⁸⁴ and could have been banned from purchasing a gun under a law expanding restrictions on drug users.

In addition to better preventing mass shootings, violent history and substance abuse gun bans would also more effectively capture the small subset of individuals with mental health conditions who engage in run-of-the-mill violence. Analysis of the MacArthur Violence Risk Assessment Study data found that eighty-nine percent of former psychiatric patients who committed acts of gun violence had a prior arrest, twice as high as the arrest rate of the overall sample.²⁸⁵ Researchers further found that the most violent people²⁸⁶ within the study group were those who were committed for substance abuse disorders.²⁸⁷ Not only would expanded substance abuse and violent history restrictions continue to ban this sub-group from purchasing guns, but it would also prevent those with no mental health records but who do have a high risk of future violence from obtaining guns.

Premising gun bans on substance abuse and past violent acts will undoubtedly shift the stigma from individuals with mental illness to these

²⁸⁰ See Rachel Louise Snyder, *Was the Wife of the Pulse Shooter a Victim or an Accomplice?*, NEW YORKER (Mar. 14, 2018), <https://www.newyorker.com/news/news-desk/the-wife-of-the-pulse-night-club-shooter-goes-on-trial> [<https://perma.cc/Y2BP-DRXT>] (describing Mateen's history of domestic violence but not referencing any history of mental illness); see also Adam Goldman et al., *supra* note 174 (describing Mateen's clean record despite concerns about his connection to a terrorist group).

²⁸¹ Goldman et al., *supra* note 174 (“Mateen had a blemish-free record when he applied for a Florida license to carry concealed weapons and again when he legally purchased two firearms . . . just a few days before the shootings.”).

²⁸² See Snyder, *supra* note 280.

²⁸³ Jack Cloherty, et al., *Jared Lee Loughner Mentally Incompetent to Stand Trial in Giffords Shootings*, ABC NEWS, May 25, 2011.

²⁸⁴ See, e.g., Marc Lacey et al., *Police Stopped Loughner's Car on Day of Shooting*, N.Y. TIMES (Jan. 12, 2011), <https://www.nytimes.com/2011/01/13/us/politics/13giffords.html> [<https://perma.cc/EWC8-48AA>] (detailing the events leading up to Ms. Giffords' shooting and Loughner's prior arrest); A.G. Sulzberger & Jennifer Medina, *supra* note 78 (discussing the potential effects of the drugs Loughner used on his mental state).

²⁸⁵ Steadman et al., *supra* note 103, at 1240.

²⁸⁶ I am using “most violent” to mean the nine people in the study who committed an act of gun violence against a stranger.

²⁸⁷ Steadman et al., *supra* note 103, at 1239.

groups. Two reasons why this shift would still be preferable to the current legal landscape: First, the links between these groups and violence have been substantiated by multiple studies, and gun ban schemes focused on these groups would actually help to stem American gun violence. All laws prohibiting some kind of activity impose stigma, but the stigma is at its most problematic when the person may not, or likely does not, possess those characteristics being stigmatized.²⁸⁸ If society is to continue to insist only dangerous people should not have guns, it will stigmatize some group of people as “dangerous,” and our laws should at least focus on groups with the largest risks for violent activity.²⁸⁹

Second, the groups of people who fall into the categories of either those with substance abuse problems or those with a record of violence are large and widespread, especially when compared with the small group of individuals who have experienced serious mental illness.²⁹⁰ Each of us likely knows someone with either a substance abuse problem, a history of violence, or both, or has fallen into one of these categories at some point in our own lives. The effects of stigma would likely not be as devastating when large portions of the population either share these characteristics or have a personal relationship with an individual within the stigmatized group. This conclusion is supported by the studies of the impact of personal relationships with individuals with mental illness; when a person has a friend or relative living with a serious mental illness, she is less likely to want social distance from individuals who have been committed to a psychiatric hospital.²⁹¹

Because a substance abuse or violent history gun ban would better capture a group that poses high risks and the injuries of the associated stigma are less acute, these laws would have more benefits and fewer harms than the current mental illness gun ban.²⁹² Such a law would therefore be more appropriate than

²⁸⁸ See, e.g., Roberto Galbiati & Nuno Garoupa, *Keeping Stigma Out of Administrative Law: An Explanation of Consistent Beliefs*, 15 SUP. CT. ECON. REV. 273, 273 (2007) (“It is widely accepted that a criminal conviction generates more stigma for the convicted party than an administrative penalty [H]igher stigma associated with criminal convictions is justified on the grounds that a criminal conviction conveys more reliable information about guilt than an administrative one.” (footnote omitted)).

²⁸⁹ This necessary stigmatization of some group raises the question of whether the laws are focused on entirely the wrong question when they attempt to regulate dangerous people instead of dangerous weapons. That interesting conversation is, unfortunately, outside the scope of this Article.

²⁹⁰ See, e.g., Swanson et al., *supra* note 38, at 368 (“Even if the elevated risk of violence in people with mental illness were reduced to the average risk in those without mental illness, an estimated 96% of the violence that currently occurs in the general population would continue to occur”).

²⁹¹ Boyd et al., *supra* note 258, at 1067.

²⁹² This argument raises the interesting question of when a law’s harms outweigh its benefits to the extent that it should be repealed, which, too, is outside the scope of this Article. But any

the status quo.

CONCLUSION

Mental illness gun bans have painted people living with mental health conditions with a stigmatizing brush while doing little to stem the tide of gun violence in the United States. The harm of these laws—sanctioning the prevailing narrative that individuals with mental illness are “dangerous”—far outweighs their supposed benefits. The dangerousness narrative has real consequences: It makes employers less likely to hire individuals with mental illness, landlords less likely to rent to them, and legislators less likely to allocate money to programs to serve them. It also makes police more likely to arrest or shoot them.

If these laws were counterbalanced by a clear benefit, if individuals with mental illness truly were more likely to act violently and use firearms, then their existence would be justified. But this is not the case. The links between mental illness and violence are small and murky at best. Moreover, the nation’s mental illness gun bans exclude many who exhibit signs of future violence while including many who pose no risk. The only tangible consequence of these laws is to harden the already strong stigma against individuals with mental illness.

Mental illness gun bans should therefore be repealed. They pin the danger label on a group that is not particularly dangerous and distract lawmakers from real predictors of violence, such as past violent acts or substance abuse. Discarding these laws would thus both lessen the dangerousness stigma and its attendant harms and clear the path for gun safety laws that would be far more successful at reducing gun violence.

such analysis would surely find that a law that does not accomplish its goal of stemming gun violence, while imposing substantial stigma and attendant societal harms, is normatively undesirable.